No. 91-259

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DENICE H. REIN, et al.,

Petitioners,

—v.—

PAN AMERICAN WORLD AIRWAYS INCORPORATED,

Respondent.

DILIP JOSHI, et al.,

Petitioners,

—v.—

PAN AMERICAN WORLD AIRWAYS INCORPORATED,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

PLAINTIFFS' STEERING COMMITTEE
Karachi Hijacking

Marc S. Moller
Lead Counsel
KREINDLER & KREINDLER
100 Park Avenue
New York, New York 10017
(212) 687-8181

Daniel C. Cathcart
Wm. Marshall Morgan

On the Petition:

Lee S. Kreindler
Marc S. Moller
Steven R. Pounian
James P. Kreindler
Daniel M. Kolko

PLAINTIFFS' COMMITTEE
Lockerbie Disaster

Lee S. Kreindler
Chairman and Counsel of Record
KREINDLER & KREINDLER
100 Park Avenue
New York, New York 10017
(212) 687-8181

Michel F. Baumeister
Richard E. Brown
Stanley M. Chesley
Nicholas Gilman
Frank H. Granito, Jr.

QUESTIONS PRESENTED FOR REVIEW

Does the Warsaw Convention Treaty, despite its plain language, create an exclusive cause of action, preempting state statutory and common law?

Does the exclusion of punitive damages liability to passengers, when their damage has been caused by an airline's wilful misconduct, violate the plain language of the Warsaw Convention?

Does the Warsaw Convention, which is silent on the subject, deny well recognized state common law and statutory law rights to punitive damages?

LIST OF PARTIES TO THE PROCEEDING*

---

* *Rein v. Pan American World Airways* ("*Lockerbie Disaster*") The following plaintiffs are parties to this proceeding: Denice H. Rein; John J. Schultz; Rosanne Weston; Madeline Shapiro; John Frick Root; George H. Williams and Helena A. Williams; Arnold Asrelsky and Hope Asrelsky; Lynne R. Fraidowitz; Arnold Victor Butler; John B. Zwynenburg; Molena A. Porter; Charles M. Rosenthal; Salvatore V. Capasso and Betty-Ann Capasso; Dona B. Bainbridge; Judith A. Pagnucco; Raymond Jermyn, Sr. and Margaret M. Jermyn; Mary M. Stratis; Kathryn G. Daniels; Mary Lou Ciulla; Helen E. Hawkins; Shirin A. Vejdany; Maggie Boatman; Bernadette R. Hurst; Lisa Platt; William W. Hollister; Peter Lowenstein; Elizabeth Delude-Dix; Rose Mary Copeland; Sudhakar Dixit; Sudhakar Dixit; Larry Forsthe; Donald Malicote, Jr.; Nazir Jaafer; Roosevelt Smith; Philip M. DiMauro; Stephanie L. Bernstein; Luisa Della Ripa; Eleanor Hoey Bright; Geraldine G. Buser; Paul Halsch; Geraldine Buser; Patricia L. Kingham; Rhoda P. Miller; Jacob Posen and Bonnie J. Gregge; Leonard T. Rencevicz; William H. Johnson and Grace Johnson; M.T. Ergin; Robert Leckburg; Anthony B. Hall and Philippa W.M. Hall; Robert Leckburg; Florence Bissett; John Draheim; William J. Marek; Pamela K. Akerstrom; Ivy Ng Trimmer-Smith; Shachi Rattan; David Bell; Daniel Edward Cohen and Susan H. Cohen; Palmer N. Smith; Anne Hudson; Florencio Quiguyan; Tammy B. Chenoweth; Faith Pescatore; Melvin Bell; Leonard Colasanti and Joanne Colasanti; Margaret C. Coursey; Robert L. Coursey and Scott E. Coursey; Eugene A. Saraceni; Marilyn Swan; Meryl Shahun Rosen; Rosemary Mild and James K. Wolfe; Lynn K. Garczynski; Terry F. Gould; Glenn P. Johnson; Phillip B. Bergstrom; Felix Teran; Peter M. McCarthy; Allen Benello; William M. Pitt and Sallie H. Pitt; Susan E. Walker; John Flynn; Yvonne Reeves; Anthony J. Cardwell and Barbara A. Cardwell; Lucille Benfield; Edmundo L. Caffarone and Graciela Caffarone; Barbara W. Lieberman; George W. Wilson and Kate B. Wilson; Alan M. Davis; Marina M. Kulukundis; Elaine C. Wright; Jane E. Davis; John M. Cory; Velma Jean McGuire; Larry B. Gibson; Barbara Richardson; Michael A. Scott; Eileen T. O'Connor; Thomas Fonteller; Judith Papadopoulos; Susan M. Kosmowski; George L. Sheanshang; Anne H. Gillis; Michael J. Doyle; Barbara M. Weedon; Franziska Schauble; Ellen M. Lariviere; Patricia A. Martin; Harshida Schroff; Raquel L. Benvenuto; Patricia J.S. Simpson; Barbara A. Ahern and Thomas A. Ahern; Siobhan D. Mulroy; Dierdre T. Fortune; John C. Parker; Thomas E. Dater; Carolyn Ammerman; Vera Young; Carol McCollum; Perry Dornstein; Leo Cawley; William G. Atkinson; Suzanne Martin; Alf Corner and Pauline Corner; Joan C. Smith and Edward F. Smith; Diana Browner; Michael Woolf Tager; Rita Kelly; Catherine Sigal; Oregon Rogers; Glendon L. Rafferty; Michael Waido; Tatiana Guevorguian; Ervin Phillips; Wendy A. Giebler; Patricia A. Brunner; Marion K. Alderman; Marion K. Alderman; Beverly Braniff Jeck; Sandra B. Clarren; Francoise Boyer; Everett Woods and Ollie Woods; Vera van Tienhoven; Tadashi

Tanaka and Emi Tanaka; Kenneth S. Barclay; Marjorie G. McKee; Walter G. Morson; Aphrodite Tsairis; John Boland and Jane Boland; Loulie Canady; Susan G. Bennett; William Hudson; Sharda Bhatia.

Joshi v. *Pan American World Airways* (*"Karachi Hijacking"*) The following plaintiffs are parties to this proceeding: Dilip Joshi; Nadya Hussain and Tahira Lodhi; Dilip Parikh; Faraidoon Oshtory; Deepak C. Mehra; Pretty George and George Mathai; Avani B. Shah, Rupal B. Shah and Bipin M. Shah; Preeti Bhuva, Harshad Bhuva, Urjita Parekh, Bharat Parekh, Dwijal Dave and Khitendra Dave; Ajay Patel and Parvati Patel; Manjula S. Patel, Mehul Patel, Sangita Patel and Nikita Pital; Mahendra R. Patel and Rekha P. Kumar; Siddartha Reddy and Asha Rikddy; Sumit Bhandari; Heena Parikh; Urmila Parikh; Nilima Shah; Catherine Dumas; Shakuntala P. Sanchala; Jyotsna Bhandari; Sharon Bhandari; Yashwant S. Bhandari; Sandanand Singh, Samir Singh, and Kala Singh; Dorothy Peddi; Fareena Sultan Ahmed; Kyshore Murthy; Savithri Bhat; Aisha Begum and Mehboob Khan; Sanjay Patel and C.N. Patel; Bakul Shah and Vasanti Shah; Hara Gopal, Hadi Ali Rizvi, Mrs. Hadi Ali Rizvi, Nigar Zehra Rizvi, Farhana Rizvi, Hansa Merchant, Kankuben Gala, Jaswantiben Shah, Raksha Harshadral Shah, Pratik Shah, Jignisha H. Shah, Harshad Shah, Mrs. Farhat Hussain, Nabihah Y. Hussain, Hammed Hussain, Armish Bhaett, Jayaben R. Sanghani, Mrs. Jayaben Sanghani, Jay Grantier, M. Jayed, R.A. Hamed, Malik Netrakanti, Imram Ali and Khadiya Ali; Gayatri Dave, Gargi Dave and Vinod Dave; Shekhar Mitra and Anuradha Mitra; Nayan Pancholi; Shainaz Bhatia Gulamani, Bahikdaban Bhatia and Fatima Bhatia; Aarif Gulamani, Kabir Gulamani and Jubilee Gulamani, Paraq Sheth, Father Anthony Theordore, Said Faiz Kidwai, Suhail Qanar and Madhukanta Patel; Vishal Patel and Kirtjkunar Dhayabhai Patel; Parita Patel; Ranjaben Patel, Jayshreeber Patel and Pravin Patel; Jasmine Asher and Arun Asher; Khanjan Dalal, Kalpesh Dalal, Kalpana Shah, Deepali Desai, Mehul Shith, Utpala Desai, Milind Sharad Desai, Narendra R. Desai and Swati M. Desai; Urmi Parikh, Shilpa Patel and Priti Shah; Mukul Vaingankar, Michael Goldstein, Gloria Goldstein, Kumar Kulkarni and Arshad Faruqui; Hardayal Mehta, Anjna Mehta and Kanak Mehta; Krishnaveni Thanikaimoni, Ravindran Thanikaimoni and Kirthana Thanikaimoni; Zeba Hamid, Kamran Hamid, Jazia Hamid and Syed Hamid; Nagin Patel, Tara Patel, Satish Patel, Nathubai Patel, Govind Patel, Chotubhai Patel, Jamna Patel and Ganga Patel; Dr. Ramesh V. Bhat; Pancha Darji; Mazherullah Baig, Khalidia Baig, Shrikant Patel, Shatel Patel, Hara Gopal, Kusum Naik, Harshad Shah, Mohammed Hussain, Madhavdas Merchant, Roberto Munoz Flores, Delfina Roque de Munoz, Francisco Javier Munoz, Micaela de Munoz, Ricardo de Munoz, Mariana de Munoz, Oralia Garcia de Alvarez, Amicuta de Alvarez, Amelia de Alvarez, Elisa de Alvarez, Jose Antonio de Alvarez, Oralia de Alvarez, Norma de Alvarez, Jonathan de Alvarez and Julio Caesar de Alvarez; Rajiv Thakkar; Vinod Dave and Niranjana Dave; Gautam Dasgupta, Antusa Dasgupta, Anisha Dasgupta and Denali Dasgupta; Kusum Naik, Shrinivas

Naik, Shirish R. Naik, Sameer R. Naik and Seema Naik; Susan Kurian; Tahira Khalid; Vallabhbhai T. Sanchala; Amrutlal Darji; Meenu Sundareson and Shanker Sundareson; Anna Kurumthottathil, Bennett Kurumthottathil and Bibil Kurumthottathil; Bashir Amin; Naseeruddin Mahmood; John T. Harper; Shaily J. Raval; Mona Patel; Edessaryvalapp Unnikrishnan and Usha Unnikrishnan; Indira M. Popat, Mulraj Popat, Anu R. Thakkar and Saroj Ruparel; Hansa Joshi.

The defendant is Pan American World Airways, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: PAGE

Statutes and Other Authorities:

PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. _____

DENICE H. REIN, et al.,

Petitioners,

—v.—

PAN AMERICAN WORLD AIRWAYS INCORPORATED,

Respondent.

DILIP JOSHI, et al.,

Petitioners,

—v.—

PAN AMERICAN WORLD AIRWAYS INCORPORATED,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (App. A, *infra*, pp. A1 to A52) is reported at 928 F.2d 1267 (2d Cir. 1991). It affirmed the district court holding in *In re: Air Disaster at Lockerbie, Scotland on December 21, 1988* [*Rein et al. v. Pan American World Airways, Incorporated*] ("*Lockerbie Disaster*"), and reversed the district court holding in *In re: Hijacking of Pan American World Airways, Inc. Aircraft at Karachi International Airport, Pakistan On*

Sept. 5, 1986 [*Joshi et al. v. Pan American World Airways, Inc.*] ("*Karachi Hijacking*"). The district court opinion in *Lockerbie Disaster* (App. B, *infra*, pp. B1 to B12) is reported at 733 F.Supp. 547 (E.D.N.Y. 1990). The district court opinion in *Karachi Hijacking* (App. C, *infra*, pp. C1 to C6) is reported at 729 F. Supp. 17 (S.D.N.Y. 1990). The two appeals were consolidated in the Second Circuit.

JURISDICTION

The judgment of the Court of Appeals (App. E, *infra*, E1 to E2) was entered on March 22, 1991. By order dated May 14, 1991 (App. D, *infra*, D1 to D2), the Court of Appeals denied a petition for rehearing containing a suggestion for rehearing *en banc*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PROVISIONS OF LAW INVOLVED

These cases raise the interpretation of Articles 17, 24 and 25 of the Warsaw Convention Treaty.[1]

WARSAW CONVENTION

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

---

1 Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* 49 U.S.C. § 1502 note (1976) (Warsaw Convention).

Article 24

(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

(2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

Article 25

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

STATEMENT OF THE CASE

Petitioners in *Lockerbie Disaster* are the surviving relatives and personal representatives of passengers aboard Pan Am Flight 103 from London to New York on December 21, 1988. About forty-five minutes after departure, a bomb inside a bag checked in the cargo hold of the 747 aircraft exploded. The plane broke apart in midair and crashed in Lockerbie, Scotland. All 259 passengers and crew were killed.

Since Flight 103 involved "international transportation" with a destination or stopping place in the United States, actions against Pan Am arising from the crash of Flight 103

are governed by the Warsaw Convention and Montreal Agreement.[2]

Wrongful death actions seeking compensatory and punitive damages were commenced in various federal district courts. Federal jurisdiction was based on either federal question jurisdiction, 28 U.S.C. § 1331, under the Warsaw treaty, or diversity jurisdiction, 28 U.S.C. § 1332. The majority of complaints assert diversity and not federal question jurisdiction. The defendants named in these actions include the carrier Pan Am, two Pan Am subsidiary corporations which provided security services for Flight 103, Alert Management Services, Inc. (Alert) and Pan Am World Services, Inc. (World Services), and Pan Am's parent corporation, Pan Am Corp. All actions were consolidated for pretrial proceedings in the Eastern District of New York by order of the Judicial Panel on Multidistrict Litigation.

On June 2, 1989, respondent Pan Am moved for partial summary judgment on petitioners' punitive damage claims, claiming that punitive damages were barred by the Warsaw Convention.[3]

For the purposes of Pan Am's motion, it was presumed that the carrier committed wilful misconduct justifying an award of punitive damages. The extensive proof supporting petitioners' punitive damage claims was not submitted on the

---

2 Agreement Relating to Liability of the Warsaw Convention and Hague Protocol, Agreement CAB 18900, Approved by Executive Order E-23680, May 13, 1966 (Docket 17325), 31 Fed. Reg. 7302 (1966), reprinted in Civil Aeronautics Board, *Aeronautical Statutes and Related Material* 515-16 (1974). The Montreal Agreement was signed by Pan Am in 1966 and has remained in place up until the present time. One of the terms of the Agreement increased the Warsaw damage limitation from $8,300 to $75,000 on passenger travel with a stopping place in the United States.

3 Defendants Alert and World Services joined in Pan Am's motion, alleging that the Convention also applied to petitioners' claims against the security companies. Since petitioners had not completed their discovery, the district court did not address the motion of Alert and World Services. *Lockerbie Disaster*, B2.

pure issue of law presented.[4] Moreover, it was presumed that the applicable local law permitted the recovery of punitive damages.

On January 3, 1990, the District Court for the Eastern District of New York entered a memorandum and order granting Pan Am's motion.

Petitioners timely moved for reargument, or in the alternative, for the court to certify the memorandum and order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). On February 26, 1990, the district court entered a second memorandum and order denying petitioners' motion for reargument, but granting § 1292(b) certification. The Second Circuit entered an order granting permission to appeal on April 27, 1990.

Petitioners in *Karachi Hijacking* are injured passengers and the surviving relatives and personal representatives of passengers killed in the hijacking of Pan Am Flight 73 on September 6, 1986. Flight 73 was travelling from Bombay, India to New York, with stops at Karachi and Frankfurt, West Germany. The plane, with 386 passengers aboard, was hijacked by four armed terrorists at the Karachi airport. After holding the passengers and cabin crew hostage for twelve hours, the terrorists began to fire weapons and unload grenades in the cabin. Twenty were killed and scores injured, many seriously.

Personal injury and wrongful death actions seeking compensatory and punitive damages were brought against Pan Am in various federal courts. The actions were consolidated for pretrial proceedings in the Southern District of New York by order of the Judicial Panel on Multidistrict Litigation. Jurisdiction was based on either federal question jurisdiction, 28 U.S.C. § 1331, under the Warsaw treaty, or diversity jurisdiction, 28 U.S.C. § 1332.

---

4 Many of the facts which establish Pan Am's misconduct and repeated violations of security standards for Flight 103 are set forth in the report of the Presidential Commission appointed by President Bush to investigate the disaster. Report of the President's Commission on Aviation Security and Terrorism, May 15, 1990, per Executive Order 12686 dated Aug. 4, 1989.

Most of petitioners' actions in *Karachi Hijacking* against Pan Am are subject to the Warsaw Convention and Montreal Agreement.[5]

By memorandum opinion and order dated June 5, 1989, the district court denied Pan Am's motion for partial summary judgment on the issue of wilful misconduct, finding that there were triable issues of material facts. (713 F. Supp. 1483).

On September 8, 1989, respondent Pan Am moved for partial summary judgment dismissing petitioners' punitive damage claims. On January 18, 1990, the district court entered a memorandum opinion and order denying Pan Am's motion. On May 10, 1991, the district court certified the memorandum opinion and order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The Second Circuit entered an order granting permission to appeal on July 18, 1990.

In the courts below, petitioners argued that the Warsaw Convention did not provide the exclusive cause of action for injuries and deaths occurring in international air transportation, and that punitive damages were recoverable in Warsaw actions when allowed under local law.

The *Lockerbie* and *Karachi* appeals were consolidated for argument. On March 22, 1991, the Second Circuit affirmed the district court in *Lockerbie Disaster* and reversed the district court in *Karachi Hijacking*. It held that the Warsaw Convention provided the exclusive cause of action, preempted all other causes of action, and did not permit recovery of punitive damages.

The Second Circuit said that the Warsaw Convention

> [P]reempts state causes of action because differences in the various state laws . . . would introduce such great confusion into this subject as to destroy any hope of uniformity in applying the Convention. (A7; 928 F.2d at 1270).

The Second Circuit's denial of punitive damages was based on several grounds. The court held that Article 17's language

---

5 Pan Am has claimed, however, that the Montreal Agreement does not apply to those passengers aboard Flight 73 travelling to Frankfurt.

"damage sustained" contemplated monetary or compensatory damages only. This finding, the court held, was supported by "the context in which [Article 17] was written, the law of the contracting parties, subsequent interpretations, and the historical translation." (A35; 928 F.2d at 1282).

Addressing Article 24, the court held:

> [T]he drafting history of Article 24, together with the civil law background of the Convention, make it extremely unlikely that Article 24(2) was intended by its drafters to preserve a common law right to punitive damages.
>
> The drafter's silence on this subject leads logically to the assumption that punitive damages were not addressed because they were never contemplated. (A41; 928 F.2d at 1284).

Turning to Article 25, the court held:

> Article 25 voids only certain provisions in the event of willful misconduct, but the rest of the Convention remains fully operative, and the Convention as it then remains still is inconsistent with the notion of a punitive damages recovery. (A43; 928 F.2d at 1285).
>
> * * *
>
> [L]ifting the monetary limit on compensatory damages is the Convention's sole response to willful misconduct. . . . (A44; 928 F.2d at 1285).

Finally, the court concluded that "consideration of the purposes behind the Convention compel the conclusion that the shared expectations of the Convention's drafters did not contemplate that punitive damages be available under the Convention." (A48; 928 F.2d at 1287).

A petition for rehearing containing a suggestion for rehearing *en banc* was denied by order of the Second Circuit dated and entered on May 14, 1991. Plaintiffs petition this Court for a writ of certiorari.

SUMMARY OF ARGUMENT

Certiorari should be granted to resolve a conflict between the Second Circuit, and the Ninth Circuit and the highest court of Virginia, on whether the Warsaw Convention Treaty provides the exclusive cause of action and thus preempts state common law and statutory law.

The Court of Appeals for the Second Circuit, below, dismissed petitioners' claims for punitive damages. The core of its position was its conclusion that when the Warsaw Convention is applicable it establishes the exclusive cause of action, and that other causes of action, including those that allow punitive damages, are preempted. Absent preemption, state laws allowing punitive damages would be available in the case of wilful misconduct.

This Court has always recognized the importance of its role in treaty interpretation. It has heretofore expressly declined to decide the exclusivity of the Convention, *Eastern Airlines v. Floyd*, 499 U.S. ____, 113 L. Ed. 2d 569, 588, 111 S. Ct. 1489 (1991), and *Air France v. Saks*, 470 U.S. 392, 408 (1985).

The decision below is at variance with the plain language of Article 24 (2) of the treaty, which refers to actions "however founded" and thus denies exclusivity. In *Chan v. Korean Air Lines*, 490 U.S. 122, 135 (1989), this Court in construing this treaty said, "where the text is clear . . . we have no power to insert an amendment."

The court below also violated the plain language standard of *Chan* with respect to Article 25 of the Convention, which states that a carrier cannot avail itself of any exclusion or limitation of liability if the damage has been caused by its wilful misconduct; and with the plain language of the Convention that unified certain specified simple liability rules, irrespective of the source of the cause of action, and left other questions to local law.

The Court should also grant the petition for certiorari because the Second Circuit's preemption of state rights of action violates accepted preemption analysis. The circuit court's holding was based on an alleged conflict between rec-

ognition of state claims and purported goals of complete uniformity ascribed by the court below to the Convention's draftsmen. There is no support whatsoever for the allegation that the drafters sought complete uniformity. Recognition of state claims which do not circumvent the Treaty's monetary limitation does not create an actual conflict with any of the interests and goals sought to be achieved by the Convention.

This Court should grant the petition for certiorari, also, because the decision below is in conflict with the analysis and review of punitive damages by this Court in *Haslip* as well as this Court's refusal to read a punitive damages bar into two constitutional amendments and two statutes.[6]

I

CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN THE CIRCUITS ON WHETHER THE WARSAW CONVENTION TREATY PROVIDES AN EXCLUSIVE CAUSE OF ACTION, AND TO OVERRULE AN INTERPRETATION OF THE TREATY IN CONFLICT WITH ITS PLAIN LANGUAGE AND CONTRARY TO ACCEPTED PREEMPTION ANALYSIS

A. The holding of exclusivity and preemption was central to the dismissal, below, of the punitive damages claims

The Court of Appeals for the Second Circuit, below, held that the federal cause of action arising under the Warsaw Convention is exclusive and that the "Warsaw Convention preempts state law causes of action arising under it". (A26; 928 F.2d at 1278). The exclusive cause of action provided by the Convention, the court held, is governed by the federal common law of tort.

---

6 *Pacific Mutual v. Haslip*, 499 U.S. _____, 113 L. Ed. 2d 1, 111 S. Ct. 1032 (1991); *see also Browning-Ferris v. Kelko Disposal*, 492 U.S. 257 (1989); *Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984); *Smith v. Wade*, 461 U.S. 30 (1983).

This issue of exclusivity was expressly left open by this Court in *Air France v. Saks*, 470 U.S. 392, 408 (1985), and, more recently, in *Eastern Airlines v. Floyd*, 499 U.S. ____, 113 L. Ed. 2d 569, 588, 111 S. Ct. 1489 (1991).

The Court of Appeals, below, said:

> We conclude that the Convention preempts state causes of action because differences in various state laws—some of which view punitive damages as penal in nature, some compensatory, and some both—would introduce such great confusion into this subject as to destroy any hope of uniformity in applying the Convention. The Convention therefore bars state wrongful death actions in cases arising under it. (A6-7; 928 F. 2d at 1270).

The finding of exclusivity by the Court below was a necessary part of its barring of punitive damages. Article 25 of the Convention directs that a carrier responsible for wilful misconduct "shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability . . . ."

If the Convention's cause of action were not exclusive then other rights to punitive damages would exist under state common law and statutory law. In New York, for example, where the actions are pending and Pan Am's Headquarters are located, punitive damages are recoverable, by statute, in death cases. N.Y. Estates, Powers & Trusts Law § 5-4.3(b). In the event of wilful misconduct they would exist. Thus it was only the finding of exclusivity and preemption of state law claims that excluded punitive recoveries. Judge Mikva, dissenting in *In re Korean Air Lines Disaster of September 1, 1983*, 932 F.2d 1475 (D.C. Cir. 1991), said:

> It is one thing to say that the Convention prohibits punitive damages because it is the sole available cause of action and does not provide for them; it is quite another to conclude that Article 17 acts as a limitation on damages restricting recovery under other causes of action that allow punitive damages (*Id.* at 1493).

B. The holding of exclusivity and preemption has wide-ranging consequences in Warsaw Convention cases

The effect of this holding in the instant cases is to deny any recovery for punitive damages in these actions. The holding, however, has wide-ranging consequences in all Warsaw Convention cases, and also impacts federal removal jurisdiction. It means, for example, that all Warsaw Convention cases, whether they be for personal injury, wrongful death, baggage loss, or damage to cargo, are likely to be handled by the federal courts.

This is because any Warsaw case brought in state court would be removable. On the other hand, if, as petitioners contend, state law claims are cognizable, then these claims could be brought in state court and would not be subject to removal. *See Calderon v. Aerovias Nacionales de Colombia, Avianca, Inc.*, 738 F. Supp. 485 (S.D. Fla. 1990) (state law complaint not removable; case remanded to state court), *app. dism'd for lack of jurisdiction*, 929 F.2d 599 (11th Cir. 1991); *Eggink v. Trans World Airlines*, 1990 WL 6553, No. 87 Civ. 3403 (S.D.N.Y. 1990) ("the federal cause of action under the Warsaw Convention is the exclusive cause of action" and what plaintiff has pleaded in his complaint "must necessarily be a federal claim"; court denied plaintiffs' cross motion to remand case to state court).

The nature and elements of recoverable compensatory damages and the recipients of these damages, which have heretofore been governed in the United States by local law, are greatly affected by whether a claim is based on state law or federal common law. Under the decision below all Warsaw cases will be based on federal common law subject to the Convention's limitations.

The Second Circuit's holding will, therefore, unless it is corrected, affect the nature and outcome of Warsaw litigation for many years and many litigants.

C. The holding of exclusivity and preemption conflicts with holdings of the Ninth Circuit, the highest court of one state, and other courts

The holding below squarely conflicts with the rulings of the Court of Appeals for the Ninth Circuit in *Johnson v. American Airlines*, 834 F.2d 721, 723 (9th Cir. 1987); *In re Aircrash in Bali, Indonesia*, 684 F.2d 1301, 1311 n. 8 (9th Cir. 1982) ("[T]he Convention has never been read to *limit* plaintiffs to a cause of action arising thereunder, but rather to limit the recovery in suits for injury"); and *In re Mexico City Aircrash of October 31, 1979*, 708 F.2d 400, 414 n. 25 (9th Cir. 1983) (reading *Bali* as holding that "any cause of action created by Warsaw Convention is not exclusive").

In *Mexico City*, *supra*, the Ninth Circuit held:

> [T]he delegates did not intend that the cause of action created by the Convention to be exclusive . . . state law causes of action may be invoked by plaintiffs injured during international air transportation. Such causes of action might, consistently with the Convention, provide varying measures of damages or varying specifications of persons entitled to recover . . . . *Id.* at 414, n. 25.

The Second Circuit's holding also conflicts with the conclusions of several other federal courts and judges. *See In re Korean Air Lines Disaster of September 1, 1983*, 932 F.2d 1475, 1492 (D.C. Cir. 1991) (dissenting opinion by Mikva, J.) (The Second Circuit's exclusivity holding in *Lockerbie Disaster* is "fundamental error". The majority did not reach this issue);[7] *Tokio Marine & Fire Ins. Co. Ltd. v. McDonnell Douglas Corp.*, 617 F.2d 936, 942 (2d Cir. 1980), inferentially overruled by the court below, (stating that the language of Article 24 indicates that "the Convention draftsmen . . . did not intend . . . [the Convention's] cause of action to be

---

7 *Korean Air Lines* held that no punitive damages were allowed in a case governed by the Warsaw Convention. Plaintiffs in that case based their claim to such damages on general maritime law. The *Korean Air Lines* plaintiffs have filed a Petition for Certiorari on the punitive damages issue, raising many of the same issues presented in this Petition.

exclusive"); *Alvarez v. Aerovias Nacionales de Colombia, S.A., Avianca Inc.*, 756 F. Supp. 550 (S.D. Fla. 1991); *Rhymes v. Arrow Air*, 636 F. Supp. 737, 741 (S.D. Fla. 1986) (Warsaw does not provide exclusive cause of action in cases where it applies but an exclusive remedy; "the Plaintiff may choose to state his cause of action solely on a state law theory . . . subject to the limitations of the Convention"); *Calderon v. Aerovias Nacionales de Colombia, Avianca, Inc.*, 738 F. Supp. 485 (S.D. Fla. 1990), *app. dism'd for lack of jurisdiction*, 929 F. 2d 599 (11th Cir. 1991); *In re Air Crash Disaster at Gander, Newfoundland*, 660 F. Supp. 1202, 1221 (W.D. Ky. 1987) (Warsaw not intended to displace state law); *Perkin Elmer (Computer Systems Division) v. Trans Mediterranean Airways, S.A.L.*, 107 F.R.D. 55, 61 (E.D.N.Y. 1985) ("state law cause of action may be available, even if a federal claim exists under the Convention").

These decisions have been largely based on the "however founded" language of Article 24 of the Convention (*see Section I(D) p. 14, infra.*)

Several other courts, including the Court of Appeals for the Fifth Circuit, have taken the same exclusivity position as the court below. *Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways*, 737 F.2d 456, 459 (5th Cir. 1984) *app. dsm'd, cert. denied,* 469 U.S. 1186 (1985); *Velasquez v. Aerovias Nacionales de Colombia, S.A.*, 747 F. Supp. 670 (S.D. Fla. 1990); *Stanford v. Kuwait Airlines Corp.*, 705 F. Supp. 142 (S.D.N.Y. 1989); *Eggink v. Trans World Airlines*, 1990 WL 6553, No. 87 Civ. 3403 (S.D.N.Y. 1990). *Cf. Abramson v. Japan Air Lines*, 739 F.2d 130, 134 (3d Cir. 1984), *cert. denied*, 470 U.S. 1059 (1985).

In sum, the federal district and circuit courts are in conflict on whether the Warsaw Convention provides the exclusive cause of action, precluding even claims predicated on state law which adhere to the Convention's express limitations and conditions.

The highest court of Virginia has also reached a conclusion on the exclusivity issue in conflict with the decision below.[8]

---

8 *Sheris v. Sheris Co.*, 212 Va. 825, 188 S.E.2d 367 (Va.), *cert. denied*, 409 U.S. 878 (1972) ("the Warsaw Convention does not create an indepen-

D. The holding of exclusivity and preemption is contrary to the plain language of the Warsaw Convention

The Second Circuit's exclusivity holding is directly contrary to the clear language of the Warsaw Convention.[9]

Article 24 states:

> (1) In the cases covered by articles 18 and 19 [i.e., baggage and delay claims] any action for damages, *however founded*, can only be brought subject to the conditions and limits set out in this convention.
>
> (2) In the cases covered by article 17 [i.e., the death or injury of a passenger] the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and *what are their respective rights.* (Emphasis added.)

The words "however founded" permit one conclusion—that rights of action outside the Convention may be brought, subject to the Convention's limitations. They mean that the Convention cause of action is not exclusive.

The "however founded" language has been relied on by several courts which have found the Convention cause of action non-exclusive. *See* citations Section I(C), pp. 12-13, *supra*.

Further textual support for non-exclusivity comes from Article 24(2) which states that the Convention applies "without prejudice to the questions as to who are the persons who have the right to bring suit" and **"what are their respective rights."** (Emphasis added).

---

dent right of action but only a presumption of liability leaving it for local law to grant the right of action"); *Contra Newsome v. Trans International Airlines*, 492 So. 2d 592, 599 (Ala. Sup. Ct.) (Warsaw preempts state common law causes of action), *cert. denied*, 479 U.S. 950 (1986).

9 In *Chan* v. *Korean Air Lines*, 490 U.S. 122 (1989), a Warsaw Convention case, the Supreme Court held "[w]e must thus be governed by the text . . . where the text is clear . . . we have no power to insert an amendment." *Id.* at 134.

E. The holding of exclusivity and preemption is contrary to the views of leading commentators

A leading commentator has written that the Convention both created a cause of action and allowed tort actions to be brought outside the Convention. Calkins, *The Cause of Action Under the Warsaw Convention*, 26 J. Air L. & Com. 323, 327-8 (1959) (Calkins, the author, served as Chairman of the United States Delegation to the 1955 Hague Convention). Calkins concluded:

> There is nothing in the Convention which automatically makes the cause of action under Warsaw supercede all other causes of action . . . .
>
> Not only is the implication from the drafting of Article 24 clear that the possibility of tort action was contemplated, but this point was specifically raised in the preliminary discussions held in Madrid by the Citeja.

From Warsaw's inception, commentators have agreed that the treaty is not exclusive. Drion, *Limitation of Liabilities in International Air Law* 135-6 (Martinus Nijhoff 1954) (Article 24 and its drafting history confirm that an action may be "founded on the contract or brought outside the contract as an action in tort. . ."); Matte, *Treatise on Air-Aeronautical Law* 382 (McGill University 1981), *quoting R.C. Ac. Haye*, Vol II, p. 285 (1934) (The Convention "set new bounds on an action in liability, boundary limits, but without regulating the essence itself."); Miller, *Liability in International Air Transport* 235 (Kluwer 1977) ("The phrase 'however founded' in Article 24(1) shows that the drafters of the Convention were aware that an action might be brought on several possible grounds.").

F. The holding of exclusivity and preemption conflicts with the convention's direction to leave damages to local law

Article 17 provides:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any

> other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft . . . .

While the courts have held that Article 17 creates a cause of action for passenger injuries or death,[10] they have also uniformly held that Article 17 does not define or limit the type of damages recoverable in Warsaw cases.

The overwhelming majority of courts addressing the issue have held that Article 24(2) left questions of the elements of damages to local law, with application of the forum's choice of law and substantive law rules. *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1002 (9th Cir. 1987) ("the Warsaw Convention . . . does not precisely describe how to calculate damages in a wrongful death case" and "damages are to be measured according to the internal law of a party to the Convention"); *In re Aircrash in Bali, Indonesia*, 684 F.2d 1301, 1306 (9th Cir. 1982) (applying California damage law, the court stated: "The Warsaw Convention requires recourse to local law to determine certain issues."); *Karachi Hijacking*, *supra*, 729 F.Supp. at 19 (S.D.N.Y. 1990), *rev'd sub nom In Re Air Disaster at Lockerbie, Scotland*, 928 F.2d 1267 (2d Cir. 1991) ("the Convention leaves many issues to be governed by the internal law of the parties to the Convention. One such issue is the question of what items of damages are recoverable."); *Mertens v. Flying Tiger Line*, 341 F.2d 851, 858 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965), ("regarding the issue as to which items of damage can be properly included in the award . . . [i]t seems clear that the Warsaw Convention left this issue, as it did other issues . . . to the internal law of the parties to the Convention . . ."); *Cohen v. Varig Airlines*, 62 A.D.2d 324, 334, 405 N.Y.S.2d 44, 49

---

10 *Floyd v. Eastern Airlines*, 872 F.2d 1462, 1469 (11th Cir. 1989), *rev'd on other grounds*, 499 U.S. _____, 111 S. Ct. 1489, 113 L. Ed. 2d 569 (1991); *Benjamins v. British European Airways*, 572 F.2d 913, 916-9 (2d. Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979); *Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways*, 737 F.2d 456 (5th Cir. 1984), *app. dism'd, cert. denied*, 469 U.S. 1186 (1985); *In re Mexico City Air Crash of October 31, 1979*, 708 F.2d 400 (9th Cir. 1983); *Abramson v. Japan Airlines*, 739 F.2d 130 (3d Cir. 1984), *cert. denied*, 470 U.S. 1059 (1985).

(1st Dep't 1978) (court applies New York choice of law rules and concludes that "[d]amages . . . should be awarded in accordance with the laws of New York.").

These decisions are supported by commentators on the Warsaw Convention.[11]

Clearly, the question of the type and elements of recoverable damages was left to law outside the Convention. Thus rights of action outside the Convention were not foreclosed. "[T]he question of the proper measure of damages is inseparably connected with the right of action." *See Chesapeake & Ohio Railway Co. v. Kelly*, 241 U.S. 485, 491 (1916). Having left the issues of damages (among other issues) to local law, it is incongruous to presume that the Convention was intended to circumvent other rights of recovery under local law.

G. The holding of exclusivity and preemption is contrary to accepted preemption analysis

The holding, below, is contrary to accepted preemption analysis. There is a general presumption against finding preemption of state law in areas traditionally regulated by the States. *California* v. *ARC America Corp.*, 490 U.S. 93, 101 (1989).

There is nothing in the text or Convention's drafting history that suggests that the Warsaw Convention provides the

---

11 H. Drion, *Limitation of Liabilities in International Air Law* 125-6 (Martinus Nijhoff 1954) (noting that under Article 24(2), "[t]he criteria for determining the categories of recoverable damages [under the Warsaw Convention] and the measure of damages vary greatly from country to country,"); Miller, *Liability in International Air Transport* 117 (Kluwer 1977) ("the issue of compensable damages is not regulated by the Convention and thus has to be governed by a law selected on the basis of the applicable choice of law rule."); Haanappel, *The Right to Sue in Death Cases Under the Warsaw Convention*, 6 Air. L. 66 (1981) (recoverable damages determined by local law); N. Matte, *Treatise on Air-Aeronautical Law* 383, 419-20 (McGill University 1981) (Regarding the issue of damages, the author states "Given that, in each case, it is the *lex fori* which will be the determining factor, it would be difficult to envisage a general rule, inasmuch as the Convention itself is not completed to this effect . . .").

exclusive right of recovery. Clearly, the Convention does not expressly foreclose state claims. Nor does the Convention so pervasively regulate any liability/damages scheme to make reasonable the inference that enforcement of state law is precluded[12]. Within the United States recovery for personal injuries and wrongful death has traditionally been an area of state legislation and regulation. The Convention was not intended to "occupy the field" in the realm of rights, obligations and recoveries in an international air disaster, a requisite to traditional preemption analysis. *See Floyd v. Eastern Airlines*, *supra*, 872 F.2d at 1469, *rev'd on other grounds*, 499 U.S. ____, 113 L.Ed.2d 569 (1991) ("the delegates at Warsaw in no way considered their work definitive"). A "clear and manifest" intent to supersede state laws in an area traditionally occupied by the states is nowhere to be found in the Convention itself, its history or in any Act of Congress. *See English v. General Electric Co.*, 495 U.S. ____, 110 L. Ed. 2d 65, 74-75 (1990).

The Second Circuit's finding of preemption runs counter to recent decisions of this Court holding against preemption of state tort remedies. *English v. General Electric Co.*, 495 U.S. ____, 110 L. Ed. 2d 65 (1990); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). *See also California v. ARC America Corp.*, 490 U.S. 93, 105 (1989) (state antitrust laws not preempted; "Ordinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law").

The holding below runs afoul of decisions of this Court which enjoin "seeking out conflicts between state and federal regulation where none exists." *Huron Cement Co. v. Detroit*, 362 U.S. 440, 446 (1960). The decision below did just that. Preemption is not to be implied absent an "actual conflict" between state law and federal interests and objectives. *English v. General Electric*, *supra*, 110 L. Ed. 2d at 74, 81. Recognition of state tort causes of action in a Warsaw case would not create an "actual conflict" with any interests

---

12 Indeed, the Convention's title is "Convention for the Unification of *Certain Rules* relating to International Transportation by Air" (emphasis added), and not "all rules."

within the limited ambit of the Convention sought to be promoted.

H. The holding of exclusivity and preemption confuses the Convention's creation of a cause of action with its self-contained simple liability rules, as to which uniformity was prescribed. The uniformity prescribed by the Treaty does not require or even invite exclusivity of the cause of action and preemption of state law

In reaching its preemption holding, the Second Circuit relied on federal preemption doctrine that state law may be preempted "when the subject matter demands uniformity vital to national interests such that allowing state regulation 'would create potential frustration of national purposes' ", *quoting San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959) (A18; 928 F.2d at 1275).[13] Allowance of state claims for death and injuries, the court below held, would frustrate the desire for uniformity in the laws governing carrier liability and the need for certainty in the application of those laws.

The attempt by the court below to promote uniformity exceeds and distorts the uniformity goals sought by the drafters of the Convention. The title itself of the Warsaw Convention states it is a Convention for the unification of "certain rules," and not all rules. As indicated above, damages are not among those rules, and have uniformly been governed by local law. In the United States damages have been determined by state law chosen through local choice of law rules. Petitioners believe that in both the *Lockerbie* and *Karachi* cases New York law (the place of incorporation of the principal defendant and the place of egregious corporate conduct) would apply to punitive damages.

The rules of the Convention on which uniformity is prescribed are quite simple. Article 17 establishes that the carrier is liable. Article 20 provides that the carrier can exculpate

---

13 "It is under this latter doctrine that we deduce the Convention preempts state law causes of action." *Lockerbie Disaster*, A18; 928 F.2d at 1275.

itself if it proves it took all necessary measures to prevent the damage. Article 22 places a limit on the liability of the carrier. Article 25 provides that the carrier may not avail itself of the limit if the damage has been caused by its wilful misconduct. Article 28 specifies where suit may be brought. In addition, Articles 3, 4, 5, 6, and 8 establish uniformity as to documentation such as tickets and waybills.

Several other articles expressly leave particular matters to local law. Article 24 (2), by providing that the Convention applies "without prejudice to the questions as to . . . what are their [plaintiffs'] respective rights," provides that local law defines damages elements. Article 21 leaves the rules concerning contributory negligence, Article 25 leaves the definition of wilful misconduct, Article 28 (2) leaves matters of procedure and Article 29 (2) leaves the method of calculating the time limitation period to the law of the court to which the case is submitted.

The Court of Appeals, below, confused these simple, built-in rules, on which uniformity was intended and expressly prescribed, with the existence of the cause of action created by the Convention and the existence of state causes of action including those which permit punitive damages. The court said:

> Hence, the test to be applied is whether these goals of uniformity and certainty are frustrated by the availability of state causes of action for death and injuries suffered by passengers on international flights. We do not see how the existence of state law causes of action could fail to frustrate these purposes. (A18; 928 F.2d at 1275).

The court was wrong. The Convention is specific as to which rules should be uniform and certain. Damages is not one of them. On the contrary they are specifically excluded from uniform treatment by Article 24 (2). The identity of the cause of action "however founded" is irrelevant to the identity of the rules which are uniform and certain. The rules are uniform and certain irrespective of the source of the cause of action.

State law claims which do not attempt to circumvent Warsaw's limitations and conditions do not threaten the Convention's uniformity goals in any way. "[T]he uniformity desired by the drafters of the Convention was not complete and utter uniformity . . . By creating an exclusive remedy, the Convention achieved the uniformity desired while still allowing the use of state law." *Alvarez v. Aerovias Nacionales de Colombia*, *supra*, 756 F. Supp. at 555; Calkins, *The Cause of Action under the Warsaw Convention*, *supra*, J. Air L. & Com. 323, 342 (1959) ("The need for uniformity does not apply to the question of what constitutes 'damage'. The Convention is silent on this point").

Allowance of state claims would not stand "as an obstacle to the accomplishment and execution of the full purposes and objectives" of the Convention. *See Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1941).

I. The holding of exclusivity and preemption ignores the historical perspective in which the Convention was enacted

A treaty must be read in light of the laws existing at the time of its enactment. As the Supreme Court has ruled, "the language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights under them." *Guaranty Trust Co. of New York v. United States*, 304 U.S. 126, 143 (1938). Similarly, the Court has stated that "[n]o statute is to be construed as altering the common law, farther than its words import." *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 304 (1959).

When the Warsaw Convention was concluded in 1929 and adhered to by the United States in 1934 there were few federal rights of action for wrongful death. The internal law of the United States consisted of both federal and state law. When the draftsmen left the resolution of damages issues to the local law of member nations, this necessarily invoked the laws of the states in the United States as well as the nation. Neither the Convention's text nor history nor purposes permits the abrogation of state-based rights and there was no

enabling legislation by Congress that made federal law exclusive.

Whatever the merits of the Second Circuit's effort to simplify Warsaw litigation brought in American Courts, the fact remains that its holding is unwarranted by anything in the Convention or in any act of Congress. The holding below exceeds the uniformity established by the Convention. The Convention was not intended to eliminate all conflict of laws problems. Indeed, by resorting to local law in numerous instances, the treaty recognized the diversity of the legal systems of the numerous member states which adhered to the Convention. The Convention accepted and recognized the myriad laws of its member nations, provided the elemental monetary limits of the Convention were not exceeded. The Second Circuit's holding, below, does what the draftsmen purposefully eschewed.

II

CERTIORARI SHOULD BE GRANTED TO REVIEW AN INTERPRETATION OF THE TREATY THAT IGNORES ITS PLAIN LANGUAGE THAT AN EXCLUSION OF LIABILITY WILL BE DENIED TO AN AIRLINE WHEN THE DAMAGE HAS BEEN CAUSED BY ITS WILFUL MISCONDUCT

Article 25 (1) of the Warsaw Convention provides:

> The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

The district court, below, in *Karachi Hijacking* correctly held that that language ended any debate about whether the Convention excluded punitive damages. The district court said:

> Therefore, to the extent that Article 17 is construed to preempt a claim for punitive damages, it would be a limitation or exclusion of liability within the meaning of Article 25, and such claims would not be barred in cases involving wilful misconduct. (C4, 729 F. Supp at 20).

In *Chan v. Korean Air Lines*, *supra*, 490 U.S. 122, 134, (1989), also involving the Warsaw Convention, this Court said:

> We must thus be governed by the text . . . whatever conclusions might be drawn from the intricate drafting history . . . But where the text is clear . . . we have no power to insert an amendment.

Certiorari should therefore be granted to review the holding below in which the Court of Appeals fails to give the Convention its clear meaning. The court below struggles with the point at 928 F.2d 1285-1287, but cannot answer it. At 1285 it says "[w]e conclude that Article 17 is not one of the limitations or exclusions to which Article 25 refers." But Article 25 doesn't specify particular exclusions or limitations. As the district court said in *Karachi Hijacking* any provision in the Convention which excluded or limited liability would be barred by wilful misconduct.

The Court of Appeals below says, "we think lifting the monetary limit on compensatory damages is the Convention's sole response to willful misconduct . . ." (A44; 928 F.2d at 1285). But that is obviously not what the plain language of Article 25 says. That plain language dictates that *any* exclusion or limitation of liability is lost to the carrier if the damage was caused by its wilful misconduct.

III

CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT WHICH UPHOLD COMMON LAW PUNITIVE DAMAGES AND BECAUSE IT MISCONSTRUES A TREATY WHICH WAS NOT INTENDED TO EXTINGUISH COMMON LAW RIGHTS EXCEPT AS SPECIFICALLY STATED

Given this Court's recent decisions on punitive damages, certiorari should be granted to review whether the Warsaw treaty bars the award of punitive damages when allowed under American common and statutory law.

A. A punitive damages bar conflicts with recent decisions of this Court which uphold common law punitive damages and consider common law tradition as part of Warsaw's background

Four recent decisions of this Court upheld common law punitive damages and rejected claims that the Constitution or federal statutes bar punitive awards. *Pacific Mutual v. Haslip*, 499 U.S. ____, 113 L. Ed. 2d 1, 111 S. Ct. 1032 (1991) (Fourteenth Amendment of the Constitution); *Browning-Ferris v. Kelco Disposal*, 492 U.S. 257 (1989) (Eighth Amendment of the Constitution); *Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984) (Atomic Energy Act); *Smith v. Wade*, 461 U.S. 30, 36 n. 5 (1983) (Civil Rights Act).

The Warsaw Convention does not bar punitive damages any more than they do.

As this Court observed in *Haslip*:

> [T]he common-law method for assessing punitive damages was well established before the Fourteenth Amendment was enacted. Nothing in that Amendment's text or history indicates an intention on the part of its drafters to overturn the prevailing method.

113 L. Ed. at 20.

These decisions recognize punitive damages as a long established and integral part of tort remedies in common law

countries. *Pacific Mutual v. Haslip*, 113 L. Ed. 2d at 18-20 (common law punitive damages have existed in England and the United States for over two hundred years). *Browning-Ferris v. Kelco Disposal*, 492 U.S. at 278 n 24 (punitive damages are a principle of "long standing" in the United States).

This Court has also ruled that a treaty may not overturn existing common law remedies absent clear and express language. *Guaranty Trust v. United States*, 304 U.S. 126, 143 (1938); *see*, *Robert C. Herd & Co. v. Krawill Machinery*, 359 U.S. 297, 304 (1959) ("No statute is to be construed as altering the common law, farther than its words import."); *Trans World Airlines v. Franklin Mint*, 466 U.S. 243, 252 (1984) (the treaty's monetary damage limit could not be overturned in the face of "ambiguous congressional action . . ." and "[l]egislative silence").

No treaty provision bars punitive damages. The court below acknowledged that "the Convention is silent on this subject" (A6; 928 F.2d at 1270, *infra*). Moreover, Article 24 refers damages issues to local law. *See* Section II F., *infra*.

This Court recently held that common law should be considered in interpreting the Warsaw Convention. *Eastern Airlines v. Floyd*, 499 U.S. ____, 113 L. Ed. 2d 569, 583 (1991) (Court relied on "the unavailability of compensation for purely psychic injury in many common and civil law countries at the time of the Warsaw Conference").

The treaty was drafted with common law participants England and Australia, and with the United States present as an observer. Common law punitive damages were recoverable in England and Australia, along with the United States, for many years prior to and at the time of the 1929 Convention. *Pacific Mutual v. Haslip*, 113 L. Ed. 2d at 18-20, 24-25; *Browning-Ferris v. Kelco Disposal*, 492 U.S. at 278, n.24.

Given that the treaty was drafted to apply in common law as well as civil law countries, it was unreasonable for the Second Circuit to conclude that Warsaw's drafters intended a punitive bar absent a specific provision. Indeed, the court below ignored basic principles of construction by ascribing to Warsaw's drafters an intent to bar punitive damages because of their silence on the subject. Thus, the Second Circuit said

that "[t]he drafters' silence on this subject leads logically to the assumption that punitive damages were not addressed because they were never contemplated." (A41; 928 F.2d at 1284). The conclusion is not warranted.

B. Article 24 preserved common law punitive damage awards

The drafters of the Convention were unsuccessful in reaching agreement on uniform damage elements. International Conference on Private Aviation Law (Paris 1926) ("it is impossible to set in a single formula the various legal concepts of the various States . . ."); Report of Henri DeVos, CITEJA Reporter (September 1928), *translated and reprinted in* Second International Conference on Private Aeronautical Law, p. 255 (R. Horner & D. Legrez trans. 1975) (hereinafter Warsaw Minutes) (CITEJA concluded that "[i]t was not possible to find a satisfactory solution" to the question of what damages are "subject to reparation" and agreed that the issue "should be regulated independantly from the present Convention.").

Article 24 provided that the Convention applied "without prejudice" to the "respective rights" of the plaintiffs:

> any action for damages, *however founded*, can only be brought subject to the conditions and limits set out in this convention . . . *without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.* (Emphasis added).

The "rights" preserved by Article 24 are the elements of damages. *See* Section II(F), *supra*.

The court below conceded that pursuant to Article 24 "the Convention leaves the measure of damages to the internal law of parties to the Convention". (A37; 928 F.2d at 1283). Nevertheless, the court failed to apply the Convention's "without prejudice" to plaintiffs' "rights" provision to common law punitive damages.

The only uniform damages provision was the treaty's central limitation provision: Article 22's monetary limitation. The drafters were satisfied to leave damages questions to

local law, provided that "any action for damages, however founded . . ." were subject to the treaty's monetary damage limit. Drion, *Limitation of Liability in International Air Law*, 135-6 (Martinus Nijhoff 1954); Calkins, *The Cause of Action under the Warsaw Convention*, 26 J. Air L. & Com. 323, 342 (1959) ("The need for uniformity does not apply to the question of what constitutes 'damage.' The Convention is silent on this point.").

The decision below establishes a non-uniform double standard. The damage awards of common law plaintiffs are restricted.[14] But plaintiffs in civil law nations may recover all available local law damages, including moral damages, which encompass a punitive element since they are based in part on the defendant's degree of fault. *International Encyclopedia of Comparative Law*, Vol. XI, pp. 9-11–9-13; Mazeaud & Tunc, *Traité de la Responsibilité Civile* 391, 396 (5th Edition 1957) (in France, moral damages are recoverable, and one factor in setting the award is the defendant's degree of fault); Tunc & McGregor, *International Encyclopedia of Comparative Law*, Vol. XI, pp. 9-12–9-13 (under German law, the tortfeasor's degree of fault is routinely considered to increase compensatory damage awards.).

C. Article 17 establishes the conditions for airline liability and does not bar punitive damages

Article 17 provides that "[t]he carrier shall be liable for damage sustained in the event of death . . . of a passenger . . ." but does not define recoverable damages. Miller, *Liability in International Air Transport* 125 (Kluwer 1977) ("Article 17 . . . did not purport to regulate the type of damage which could be compensated."); Haanappel, *The Right to Sue in Death Cases under the Warsaw Convention*,

---

14 Warsaw signatories Australia, Canada and the United States allow the recovery of common law punitive damages without limitation. *Browning-Ferris v. Kelco Disposal*, 492 U.S. at 273 n.18 (1989). In 1964, thirty-five years after the Warsaw Conference, England imposed restrictions on punitive damages, but did not completely bar recovery. *Ibid. Rookes v. Barnard*, [1964] A.C. 1129, 1 All E.R. 367 (H.L.).

6 Air. L. 66 (1981) ("the Convention provides neither for a substantive rule of law nor for a choice of law rule . . . for the meaning of the word 'damage' in Article 17 . . .").

The purpose of Article 17 was to establish the conditions precedent which trigger an airline's liability under the Convention. *Air France v. Saks*, *supra*, 470 U.S. at 397 ("Article 17 establishes the liability of international air carriers for harm to passengers"). These conditions are: the death, wounding or bodily injury to a passenger; an accident which caused the damage; and such accident taking place on board the aircraft or in the course of any of the operations of embarking or disembarking. Once Article 17's conditions are met, "the carrier's liability is engaged" and "the normal rules governing damages apply; they have not been affected by the Convention." Miller, *Liability in International Air Transport* 125-6 (Kluwer 1977).

The Second Circuit, below, held that Article 17's imposition of liability on airlines for "damage sustained" constituted a punitive damage bar because "Article 17 contemplates monetary or compensatory damages only" (A32; 928 F.2d at 1281). But Article 17 is affirmative, granting the passenger a *quid pro quo* for the treaty's monetary damage limit. The text does not suggest that Article 17 favored the carrier with a punitive damage bar.

Indeed, in the discussions at the Warsaw Conference and CITEJA meetings concerning Article 17 and its predecessor articles, no mention was ever made of specifying, confining or eliminating any damage element. Warsaw Minutes, *supra* at 166-7, 255.

In fact, in *Smith v. Wade*, 461 U.S. 30 (1983), this Court rejected similar arguments that the phrase "for redress" in 42 U.S.C. § 1983 "means that Congress intended to limit recovery to compensatory damages." *Id.* at 36, n.5. This Court found such a construction was "strained" and ruled that punitive damages were recoverable under the statute. *Ibid.* Likewise, in *Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984), this Court rejected claims that the Atomic Energy Act, which imposed a monetary cap on recoveries against nuclear plant operators, barred state law punitive damages.

Similarly this Court should reverse the decision below insofar as it reads into the words "damage sustained" a bar of punitive damages.

IV

CERTIORARI SHOULD BE GRANTED BECAUSE IMPORTANT QUESTIONS OF TREATY INTERPRETATION ARE INVOLVED

This Court has recognized the importance of issues involving treaty interpretation in its certiorari decisions including numerous cases involving the Warsaw Convention itself.

This Court has said:

> The object of our granting writs of certiorari on points of statutory or treaty interpretation is to determine the correctness of fundamental points that lower courts have resolved . . . . *Chan* v. *Korean Air Lines*, 490 U.S. 122, 134 n.5 (1989) (Interpretation of Warsaw Convention).
>
> We granted certiorari . . . to interpret this important treaty provision . . . . *State of Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. 658, 674 (1979) (treaties relating to fisheries).
>
> We granted certiorari because the cases involve important rights asserted in reliance upon federal treaty obligations. *Kolovrat v. Oregon*, 366 U.S. 187, 191 (1961).

Certiorari has been granted to review interpretations of the Warsaw Convention. *Eastern Airlines v. Floyd*, 499 U.S. ____, 113 L. Ed. 2d 569, 111 S. Ct. 1489 (1991); *Chan v. Korean Air Lines*, 490 U.S. 122, 127 (1989); *Air France v. Saks*, 470 U.S. 392 (1985); *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243 (1984); *Lisi v. Alitalia*, 390 U.S. 455 (1968).

This Court has also recognized the importance of punitive damages in granting certiorari. *City of Newport v. Facts Concerts Inc.*, 453 U.S. 247, 255, 257 (1981).

CONCLUSION

Certiorari should be granted to address the conflict among the courts on the issue of preemption of state causes of action by the Warsaw Convention and to address important questions of treaty interpretation concerning the recoverability of punitive damages in an action governed by the Warsaw Convention when allowed under local law.

Respectfully submitted,

PLAINTIFFS' STEERING COMMITTEE
Karachi Hijacking

MARC S. MOLLER
Lead Counsel
KREINDLER & KREINDLER
100 Park Avenue
New York, New York 10017
(212) 687-8181

Daniel C. Cathcart
Wm. Marshall Morgan

PLAINTIFFS' COMMITTEE
Lockerbie Disaster

LEE S. KREINDLER
Chairman and Counsel of Record
KREINDLER & KREINDLER
100 Park Avenue
New York, New York 10017
(212) 687-8181

Michel F. Baumeister
Richard E. Brown
Stanley M. Chesley
Nicholas Gilman
Frank H. Granito, Jr.

On the Petition:

LEE S. KREINDLER
MARC S. MOLLER
STEVEN R. POUNIAN
JAMES P. KREINDLER
DANIEL M. KOLKO

APPENDIX

INDEX TO APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 269—August Term 1990

(Argued October 1, 1990 Decided March 22, 1991)

Docket No. 90-7388

IN RE: AIR DISASTER AT LOCKERBIE, SCOTLAND ON DECEMBER 21, 1988

DENICE H. REIN, et al.,

Plaintiffs-Appellants,

—v.—

PAN AMERICAN WORLD AIRWAYS INCORPORATED,

Defendant-Appellee.

No. 460—August Term 1990

(Argued October 1, 1990 Decided March 22, 1991)

Docket No. 90-7636

IN RE: HIJACKING OF PAN AMERICAN WORLD AIRWAYS, INC. AIRCRAFT AT KARACHI INTERNATIONAL AIRPORT, PAKISTAN ON SEPTEMBER 5, 1986

DILIP JOSHI, NADYA HUSSAIN, TAHRA LODHI, DILIP PARIKH, FARAIDOON OSHTORY, et al.,
Plaintiffs-Appellees,

—v.—

PAN AMERICAN WORLD AIRWAYS, INC.,
Defendant-Appellant.

Before:

CARDAMONE and MINER, *Circuit Judges*
and POLLACK, *District Judge**

Pan American World Airways, Inc., appeals from the January 18, 1990 memorandum opinion and order of United States District Court for the Southern District of New York (Sprizzo, J.) denying partial summary judgment on defendant Pan American's motion to dismiss plaintiffs' claims for punitive damages.

Reversed and punitive damages claims dismissed.

Denice Rein, et al. appeal from the January 3, 1990 memorandum opinion and order and from the February 26, 1990 memorandum of the United States District Court for the Eastern District of New York (Platt, C.J.) granting partial summary judgment in favor of defendant Pan American World Airways, Inc., and dismissing plaintiffs' punitive damage claims.

Affirmed.

* Honorable Milton Pollack, United States District Court for the Southern District of New York, sitting by designation.

90-7388

LEE S. KREINDLER, Chairman, Plaintiffs' Committee, New York, New York (Steven R. Pounian, James P. Kreindler, Michael F. Baumeister, Richard E. Brown, Stanley M. Chesley, Nicholas Gilman, Frank H. Granito, Jr., Kreindler & Kreindler, New York, New York, of counsel), *for Plaintiffs-Appellants.*

RICHARD M. SHARP, Washington, D.C. (Frederick C. Schafrick, Elizabeth M. Brown, Shea & Gardner, Washington, D.C.; James M. Shaughnessy, Windels, Marx, Davies & Ives, New York, New York; Condon & Forsyth, New York, New York, of counsel), *for Defendant Appellee.*

James E. Landry, George S. Lapham, Jr., David A. Berg, Air Transport Association of America, Washington, D.C., *filed a brief Amicus Curiae.*

90-7636

LEE S. KREINDLER, Chairman, Plaintiffs' Committee, Lockerbie Disaster, New York, New York (Steven R. Pounian, James P. Kriendler, Michael F. Baumeister, Richard E. Brown, Stanley M. Chesley, Nicholas Gilman, Frank H. Granito, Jr., Kreindler & Kreindler, New York, New York, of counsel; Marc S. Moller, Lead Counsel, Plaintiffs'

Steering Committee, Karachi Hijacking, Daniel C. Cathcart, Wm. Marshall Morgan, Kreindler & Kreindler, New York, New York, of counsel), *for Plaintiffs-Appellees*.

RICHARD M. SHARP, Washington, D.C. (Frederick C. Schafrick, Elizabeth M. Brown, Shea & Gardner, Washington, D.C.; James M. Shaughnessy, Windels, Marx, Davies & Ives, New York, New York, of counsel), *for Defendant-Appellant*.

CARDAMONE, *Circuit Judge*:

A single question of law is raised on appeals from two district court orders: one involves the crash of Flight 103 over Lockerbie, Scotland; the other a hijacking in Karachi, Pakistan.

The Lockerbie case arose from the terrorist bombing of Pan Am Flight 103 from London to New York on December 21, 1988. The surviving relatives and personal representatives of those who died sued Pan American World Airways, Inc. (Pan Am), two Pan Am subsidiary corporations that provided security services, and Pan Am's parent corporation. All actions were consolidated in the Eastern District of New York by order of the Judicial Panel on Multidistrict Litigation. On June 2, 1989 Pan Am moved for partial summary judgment on the punitive damages claims, asserting they were barred

by the Warsaw Convention.[1] For purposes of Pan Am's motion, the district court presumed that the carrier committed willful misconduct, and that the applicable local law permitted the recovery of punitive damages. On January 3, 1990 the Chief Judge of the Eastern District (Platt, C.J.) granted partial summary judgment and dismissed the punitive damages claims. On February 26, 1990 Chief Judge Platt entered a second memorandum and order denying plaintiffs' motion for reargument, but granting certification under 28 U.S.C. § 1292(b) for immediate appeal of the case to this Court as one involving a controlling question of law.

The Karachi case arose from a terrorist hijacking of Pan Am Flight 73 from Bombay, India, to New York, stopping at Karachi and Frankfurt on September 6, 1986. The surviving relatives and personal representatives of those killed sued Pan Am, and the actions were consolidated in the Southern District of New York by order of the Judicial Panel on Multidistrict Litigation. The district court (Sprizzo, J.) denied Pan Am's motion for partial summary judgment on the issue of whether Pan Am had committed willful misconduct, as well as Pan Am's later motion for partial summary judgment seeking to dismiss plaintiffs' claims for punitive damages.

None of the parties dispute that these cases are governed by the Warsaw Convention and by the Montreal

---

1 Convention for the Unification of Certain Rules Relating to International Transportation by Air, *done* at Warsaw, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted at* 49 U.S.C. app. § 1502 note, Warsaw Convention (1988).

Accord.[2] The issue presented is independent of any factual situation. We must decide whether a plaintiff may state a claim for punitive damages in a wrongful death action governed by the Warsaw Convention, assuming the carrier committed willful misconduct. Although the Convention is silent on this subject and the lack of legislative materials addressing the issue makes interpreting the Convention's effect on punitive damages claims difficult, we are persuaded that the purposes for which the Convention was created are not consistent with an award of punitive damages. Thus, we hold that these plaintiffs may not recover such damages.

So much has been written concerning the Convention since its adoption over 50 years ago that we must take care not to get lost in a wilderness of words. To that end we think it helpful to set forth the analytical framework for the discussion that follows. We discuss first the Convention's purposes, structure and history. (I). Then, in order to clearly identify what the term "punitive damages" means in the context of our consideration of the Convention, we focus analysis by exploring initially the role of punitive damages in American law generally, examining the nature of the recovery permitted under state and federal law; and, after that, by deciding whether the Convention provides an exclusive cause of action or whether it permits separate state law actions claiming punitive damages. (II). We conclude that the

---

2 Agreement Relating to Liability Limitations of the Warsaw Convention and Hague Protocol, Agreement CAB 18900, Approved by Executive Order E-23680, May 13, 1966 (Docket 17325) (1966), reprinted in Civil Aeronautics Board, Aeronautical Statutes and Related Material 515-16 (1974) (Montreal Agreement). The Montreal Agreement raised the amounts recoverable under the Warsaw Convention and its Protocols for passengers on international flights with departure or destination points in the United States to $75,000.

Convention preempts state causes of action because differences in the various state laws—some of which view punitive damages as penal in nature, some compensatory, and some both—would introduce such great confusion into this subject as to destroy any hope of uniformity in applying the Convention. The Convention therefore bars state wrongful death actions in cases arising under it. (III).

We next hold that because air carrier liability is a uniquely international problem requiring uniform interpretation, the Convention must be interpreted according to federal common law. We adopt the federal common law of torts to construe the Convention and determine that federal common law does not contemplate a compensatory element in a punitive damages claim. (IV). Having identified the governing law and the nature of punitive damages potentially available under that law, we turn to the Convention to see whether it allows for the kind of punitive damages available to plaintiffs under federal law. Our analysis of the Convention reveals that Article 17 did not contemplate air carrier liability for that type of punitive damages; Article 24 does not preserve such liability under local law; and the Convention does not permit the sort of punitive damages available under federal law to be awarded, even when the liability limitations are lifted under Article 25 in cases of willful misconduct. (V). Finally, we believe policy considerations that led the various contracting parties to adhere to the Warsaw Convention strongly militate against recognition of punitive damages. (VI).

I PURPOSES, STRUCTURE AND HISTORY OF THE WARSAW CONVENTION

The Warsaw Convention was drafted when the airline industry was in its infancy. It was the product of two international conferences—the first held in Paris in 1925 and the second in Warsaw in 1929—and four years of work by the interim Commité International Technique d'Experts Juridique Aériens (CITEJA) formed at the Paris Conference. The Convention had two primary goals: first, to establish uniformity in the aviation industry with regard to "the procedure for dealing with claims arising out of international transportation and the substantive law applicable to such claims," as well as with regard to documentation such as tickets and waybills; second—clearly the overriding purpose—to limit air carriers' potential liability in the event of accidents. Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 498-99 (1967) (Lowenfeld & Mendelsohn); *Block v. Compagnie Nat'l Air France*, 386 F.2d 323, 327 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968).

The liability limit was believed necessary to allow airlines to raise the capital needed to expand operations and to provide a definite basis upon which their insurance rates could be calculated. Lowenfeld & Mendelsohn, at 499-500; H. Drion, *Limitation of Liabilities in International Air Law* 16 (1954) (Drion, *Limitation of Liabilities*); *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1467 (11th Cir. 1989), *cert. granted*, 110 S. Ct. 2585 (1990). The nations drafting this provision had a direct interest in establishing liability limits since nearly all existing airlines were either owned or heavily subsidized by the various contracting states. The drafters also

believed that a liability limit would lessen litigation. Sen. Comm. on For. Relations, *Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules*, Sen. Exec. Doc. No. G, 73d Cong., 2d Sess. 3-4 (1934) (Secretary of State Cordell Hull).

To effect these purposes, the Convention adopted a trade-off between carriers and their passengers: passengers would have the absolute right to compensation for injuries up to 125,000 Poincare francs, (Articles 17, 22(1)), unless the carrier could prove it had taken all necessary measures to avoid the damages (Article 20(1)). Passengers could claim no damages above the 125,000 franc limit unless they demonstrated that the carrier had engaged in willful misconduct, in which case the Convention's limits on carrier liability would be lifted (Article 25). While later agreements such as the 1966 Montreal Accord somewhat modified this scheme, so that in some cases the liability limit is higher and the carrier may no longer raise the defense that it took all necessary measures, *see* Lowenfeld & Mendelsohn at 596-600, the basic structure of the Convention remained the same.

The Convention entered into force in February, 1933 and by the end of that year most European nations were members. Although the United States had not participated in the work of CITEJA and only sent an observer to Warsaw, it moved quickly thereafter, depositing its instrument of adherence on July 31, 1934. President Roosevelt proclaimed the Treaty 90 days later. Lowenfeld & Mendelsohn, at 501-02.

The nature of the Convention can be identified to some extent from the fact that the Convention's struc-

ture clearly derives from the civil law of contracts. Calkins, *The Cause of Action Under the Warsaw Convention*, 26 J. Air L. & Com. 217, 223 (1959) (Calkins, *The Cause of Action*). The liability regime established by the Convention is very similar to the French law of contractual liability for domestic carriers. G. Miller, *Liability in International Air Transport* 234 (1977). For example, the French law of contract implies a "*stipulation pour autrui*" in contracts of carriage, allowing a decedent's relatives to bring an action in damages against the carrier without having to prove the carrier's negligence, but subjecting the plaintiffs to any limitation or exclusion clauses contained in the contract. *Id.* at 236-37; A. Lowenfeld, *Aviation Law* § 1.52, at 7-17. German law is similar. *Id.* § 1.53, at 7-21 to -23.

Article 25 of the Convention, which lifts the liability limitation in cases of willful misconduct, also derives from the basic civil law principle that "[n]o one can escape the consequences of one's *dol*, or intentional fault." Miller, *Liability in International Air Transport* at 73. This principle was often "extended to cases of gross negligence (*faute lourde*)," *id.*, and the Convention deliberately allows common law countries to subject air carriers to unlimited liability in cases of willful misconduct. *Id.* at 80. Before turning to the text of the Convention, we direct our attention to the role of punitive damages in American law in order to identify clearly what kinds of damages the Warsaw Convention might bar.

II PUNITIVE DAMAGES IN AMERICAN LAW

The parties in the suits before us contend that punitive damages are everything from damages meant to

compensate certain types of injuries to damages meant purely to punish the tortfeasor. To explore fully the nature of the recovery permitted under state and federal law, we must keep in mind that punitive damages derive their meaning depending on whether federal law or a given state law, such as Massachusetts, New Hampshire or Connecticut, governs. Here the plaintiffs in each case have asserted both federal and state law causes of action.

Punitive damages have historically played a role in the American common law of tort. *See Smith v. Wade*, 461 U.S. 30, 35 & n.3 (1983); Belli, *Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society*, 49 UMKC L. Rev. 1 (1980) (Belli, *Punitive Damages*). In the early case of *Day v. Woodworth*, 54 U.S. (13 How.) 363 (1851), the Supreme Court recognized the existence and propriety of punitive damages, noting that it could "inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff." *Id.* at 370-71. Punitive damages have had a hazy history—sometimes used to punish, and sometimes used to compensate a plaintiff for injuries to pride, dignity, or reputation that would not otherwise be compensated through traditional tort awards intended to make a plaintiff whole. Today the Supreme Court views punitive damages as penal rather than compensatory. *See Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2932 (1989) (O'Connor, J., concurring, in part, and dissenting, in part) (citing numerous Supreme Court cases recognizing the penal nature of punitive damages). It has characterized these damages as private fines used to punish a defendant's reprehensible conduct

and to deter its repetition. *See International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 48 (1979).

Lower federal courts and a majority of state courts have also held that punitive damages are penal, rather than compensatory, in nature. *See Floyd*, 872 F.2d at 1486 ("Punitive damages are intended to penalize the wrongdoer in order to benefit society"); *Harpalani v. Air-India, Inc.*, 634 F. Supp. 797, 799 (N.D. Ill. 1986) (purpose of punitive damages is to punish and deter); *Andor v. United Air Lines, Inc.*, 303 Or. 505, 511-13, 739 P.2d 18, 22-23 (Or. 1987) (aim of punitive damages is punishment, deterrence of defendant and others from engaging in tortious conduct, and vindication of social norms). *See also*, Restatement (Second) of Torts § 908 (punitive damages are "damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future"); Kenney, *Punitive Damages in Aviation Cases: Solving the Insurance Coverage Dilemma*, 48 J. Air L. & Com. 753, 755 (1983).

A minority of state courts view punitive damages as serving a compensatory function. *See Peisner v. Detroit Free Press*, 242 N.W.2d 775, 780 (Mich. Ct. App. 1976) (purpose of punitive damages not to punish defendants but "to fully compensate the plaintiffs for the injury suffered by them because of the defendants' actions"); *Kelsey v. Conn. State Employees Ass'n.*, 427 A.2d 420, 425 (Conn. 1980); *Bixby v. Dunlap*, 56 N.H. 456 (N.H. 1876); *Eshelman v. Rawalt*, 131 N.E. 675, 677-78 (Ill. 1921); Belli, *Punitive Damages*, at 6. These damages are either given "on the theory that the injury is greater, and the actual damages are increased, by reason of the

aggravating circumstances'' of the tort or to compensate the plaintiff for litigation costs. 22 Am. Jur. 2d *Damages* § 735 (1988). This view of punitive damages existed in New Hampshire and Michigan when the United States first adhered to the Warsaw Convention in 1934.

In some states, ''exemplary damages may properly partake of both a punitive and a compensatory character.'' *Id.* § 733; C. McCormick, *Damages*, § 78, at 279 (1935). We noted, for example, in *Racich v. Celotex Corp.*, 887 F.2d 393, 397 (2d Cir. 1989), that New York has viewed punitive damages ''as having a purpose beyond punishment, 'afford[ing] the injured party a personal monetary recovery over and above compensatory loss.' '' *Id.*, *citing Wittman v. Gilson*, 70 NY2d 970, 972 (1988).

III PREEMPTION OF STATE LAW CAUSES OF ACTION

It follows from the preceding discussion that were we to hold that plaintiffs could bring state law causes of action, then such a cause of action for punitive damages would sometimes include a compensatory element. On the other hand, if the federal cause of action is exclusive, then we would look to federal law to decide whether that body of law—which generally recognizes no compensatory element in punitive damages claims—would allow such a claim.

A. *Current Second Circuit Law*

We have left open the question of whether state causes of action are still available under the Convention. As the law in this Circuit now stands, we have ruled

that the Warsaw Convention creates a cause of action enabling a plaintiff to sue directly under its terms. *See Benjamins v. British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979). This holding reversed prior cases that had held the Convention created only a presumption of liability, not a cause of action. *See Komlos v. Compagnie Nationale Aire France*, 209 F.2d 436 (2d Cir. 1953), *cert. denied*, 348 U.S. 820 (1954); *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957).

Benjamins left open the question of whether state causes of action were still available under the Convention, and only two of our cases have touched on this subject. *See In Re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*, 705 F.2d 85 (2d Cir.) (affirming on other grounds district court decision that regarded the cause of action under the Convention as exclusive, without discussing exclusivity issue), *cert. denied*, 464 U.S. 845 (1983); *cf. Tokio Marine & Fire Ins. Co. v. McDonnell Douglas Corp.*, 617 F.2d 936, 941-42 (2d Cir. 1980) (postulating in dicta that action under the Convention might not be exclusive). The Supreme Court has declined to address the question of exclusivity. *See Air France v. Saks*, 470 U.S. 392, 408 (1985). We consider the issue an open question.

B. *Preservation and Preemption*

The issue is not whether the Convention preempts state laws with which it is in direct conflict, as it obviously must under the Supremacy Clause of the United States Constitution. *See* U.S. Const. art. VI. Nor is it whether a plaintiff may bring a state cause of action

when the claim does not arise under the Warsaw Convention, which a plaintiff plainly may institute. *See Abramson v. Japan Airlines Co.*, 739 F.2d 130, 134 (3d Cir. 1984), *cert. denied*, 470 U.S. 1059 (1985); *Tokio Marine*, 617 F.2d at 941-42. Instead, the question we must decide is whether state causes of action are preempted when the state claim alleged falls within the scope of the Convention. The answer to the question we believe is "yes", for several reasons.

To begin with, although neither the Convention itself nor any Congressional action at the time the United States adhered to the Convention expressly preempted state law, *Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 737 F.2d 456, 459 (5th Cir. 1984), *cert. denied*, 469 U.S. 1186 (1985), various authorities support our conclusion that the Convention itself does not expressly preserve state law causes of action either.

The question of whether the Convention provides the exclusive liability remedy for international air carriers by providing an independent cause of action, or whether state law causes of action are preserved under the Convention has been addressed by several courts. In *Boehringer-Mannheim*, the Fifth Circuit held the Convention cause of action is exclusive. *Id.* at 458. Without in-depth analysis, the court ruled that Texas law was preempted, pointing out that an "obvious major purpose of the Warsaw Convention was to secure uniformity of liability for air carriers," and that uniformity has national as well as international application. *Id.* at 459. The Ninth Circuit has also rebutted the idea that a cause of action may be founded on some law other than the Convention, stating: "Such causes of action might, con-

sistently with the Convention, provide varying measures of damages or varying specifications of persons entitled to recover." *In Re Mexico City Aircrash of October 31, 1979*, 708 F.2d 400, 414 n.25 (9th Cir. 1983).

Other contracting parties have also concluded that the Convention cause of action is exclusive. French courts, for example, have so decided. *See* Miller, *Liability in International Air Transport* at 237 (French court held plaintiffs could not avoid liability limits by renouncing contractual rights and suing under a negligence theory). In addition, England, Canada, and Australia have all enacted implementing statutes that make an Article 17 action the exclusive remedy for claims governed by the Convention. Carriage by Air Act, 1932, 22 & 23 Geo. 5, ch. 36, § 1(4) (England); Civil Aviation (Carrier's Liability) Act, 1959-1973, § 12(2), 2 Austl. Acts P. 643, 645 (1974) (Australia); Carriage by Air Act, § 2(5), Can. Rev. Stat., ch. C-26 (1979) (Canada).

It is significant that Australia and Canada are federal states, though Canada has "an essentially unified judicial system," but that these Acts have eliminated the choice of law problems with which American courts have struggled. Miller, *Liability in International Air Transport* at 228-31. Further, other countries' interpretations of the Convention are "entitled to considerable weight" by this Court. *See Benjamins*, 572 F.2d at 919; *see also Chan v. Korean Airlines, Ltd*, 109 S. Ct. 1676, 1683 (1989); *Saks*, 470 U.S. at 396-97; *Reed v. Wiser*, 555 F.2d 1079, 1083 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977).

Plaintiffs argue that, by use of such phrases as "the law of the court to which the case is submitted," Article 25 (limitations of liability lifted in cases of willful mis-

conduct); *see* Article 21 (contributory negligence), Article 22 (periodic payments), Article 28 (procedural questions), and Article 29 (calculation of statute of limitations), the Convention left certain matters such as the elements of damages to local law, by which the plaintiffs mean state law. Without delving too deeply into the Convention at this point, we see no reason to believe that the drafters meant to denote the laws of *subdivisions* within nations. *See Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851, 855 (2d Cir.) ("The basic unit of international law is the nation-state and it is fair to assume, absent clear indications to the contrary, that [the Convention] was written with reference to nation-states, not to areas and subdivisions of nation-states."), *cert. denied*, 382 U.S. 816 (1965). As Professor Miller points out, our "highly complex structure of political and judicial jurisdictions . . . is specific to the United States." Miller, *Liability in International Air Transport* at 232. The fact that Australia and Canada, the two nations whose law is closest to our own, have applied a single substantive law to actions under the Convention supports our view that the Convention does not preserve any state law causes of action.

We therefore decline to read into the Convention any attempt to preserve a right to a state law cause of action in addition to the action provided under the Convention itself. The way the other parties have viewed the Convention, its emphasis on uniformity, and the need for a single, unified rule on such points as the recoverability of punitive damages lead to the belief that the Convention should be interpreted as making all actions—other than those not based on the Convention—exclusive under it.

The next question to be answered is whether, if such state law causes of action are not *preserved* by the Convention, they are in fact *preempted* by the Convention. The Supreme Court has set forth several routes by which state law may be preempted. Congress may, of course, expressly preempt state law, or it may enact a scheme of federal legislation so pervasive that a court may infer Congress left no room for the states to legislate in the area. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-300 (1988); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). It may also preempt state law when the subject matter demands uniformity vital to national interests such that allowing state regulation "would create potential frustration of national purposes." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959); *see Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144 (1963). It is under this latter doctrine that we deduce the Convention preempts state law causes of action.

The principal purposes that brought the Convention into being and presumably caused the United States to adhere to it were a desire for uniformity in the laws governing carrier liability and a need for certainty in the application of those laws. *See Reed*, 555 F.2d at 1090; Sen. Exec. Doc. No. G, 73d Cong. 2d Sess. 3-4 (1934) (Comments of Secretary of State Hull), *supra*. Hence, the test to be applied is whether these goals of uniformity and certainty are frustrated by the availability of state causes of action for death and injuries suffered by passengers on international flights. We do not see how the existence of state law causes of action could fail to frustrate these purposes.

C. *Implications of Allowing State Law Causes of Action*

Any attempt to construe the meaning of punitive damages under the laws of various states may easily become mired down in a morass of conflicting rules. As an illustration, it is settled law that when a plaintiff brings a state wrongful death claim based on diversity jurisdiction, a federal court must apply the choice of law rules of the district in which the court sits, and then the substantive law of the applicable state. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). An assertion of diversity jurisdiction could result in the inconsistent application of law to the claims before us. Assume the Convention barred punitive damages meant to punish the defendant, but not those meant to compensate the plaintiff for the additional injury stemming from the senselessness of the accident. If a plaintiff were allowed to bring a state law cause of action, the trial court's choice of law analysis might compel it to apply the law of a state holding the minority view of punitive damages so as to include a compensatory element. In such event, the compensatory element in the punitive damage claim might not be allowed in a case choosing the law of another state. In fact, it is quite conceivable that a trial court would be forced to apply differing law from several states to various plaintiffs.

Further, neither the choice of law rules nor the substantive law itself could be predicted with any certainty. An airline's liability could therefore vary widely depending on where the plaintiff resided or chose to sue—under Article 28 a suit may be brought in a court where the carrier is domiciled or has a principal place of busi-

ness, or where the carrier has a place of business through which the contract was made or before a court at the place of destination.

Additionally, the existence of state law causes of action would make the application of law to the federal cause of action created by the Convention even more complex. If the Convention did not bar a compensatory element in a punitive damages claim under state law, then in those cases involving federal claims as well as diversity claims entailing the minority view of punitive damages, the federal law would differ from the state law, within the same case in federal court. This would present the further problem of whether the trial court should allow a plaintiff to choose between state and federal causes of action. *Cf. Rhymes v. Arrow Air, Inc.*, 636 F. Supp. 737, 741-42 (S.D. Fla. 1986) (when plaintiff had option to plead Warsaw Convention cause of action but pleaded only state cause of action in state court, defendants could not remove action to federal court by raising the Warsaw Convention as a defense); *Trinh v. Citibank, N.A.*, 623 F. Supp. 1526, 1530 (E.D. Mich. 1985) (suggesting that a court having both types of jurisdiction should apply the forum state's choice of law rules, thereby treating the case as one arising under diversity jurisdiction), *aff'd* 850 F.2d 1164 (6th Cir. 1988), *cert. denied*, 110 S. Ct. 2602 (1990); *In Re Korean Air Lines Disaster of Sept. 1, 1983*, 704 F. Supp. 1135, 1154-55 (D.D.C. 1988) (attempting to decide whether jury trial right given to plaintiffs who had pled a cause of action under the Convention should also be afforded to other plaintiffs who had failed to plead the Convention cause of action).

There is also the possibility that state-owned airlines would be subject to different laws than private airlines—federal courts no longer have diversity jurisdiction over foreign states (many of which own airlines) as defendants—because the Federal Sovereign Immunities Act is now the sole source of federal jurisdiction in those circumstances. *See Ruggiero v. Compania Peruana de Vapores*, 639 F.2d 872, 873-78 (2d Cir. 1981). Even under those circumstances, the state of choice of law analysis is currently not uniform. *Compare Barkanic v. General Admin. of Civil Aviation of the People's Republic of China*, No. 90-7641, slip op. at 1312-1318 (2d Cir. Jan. 14, 1991) (holding that federal court must use forum state choice of law rules under the Foreign Sovereign Immunities Act) *with Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1002-03 (9th Cir. 1987) (holding that federal courts should use federal common law choice of law rules under the Foreign Sovereign Immunities Act).

Of course, we might solve the general choice of law problem presented by the Convention by adopting state law as federal law and limiting federal law to the choice of law issue. *See, e.g., Corporacion Venezolana de Fomento v. Vintero Sales*, 629 F.2d 786, 793 (2d Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981); *Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank*, 731 F.2d 112 (2d Cir. 1984). In that case, there would be consistency between the law applicable to the federal cause of action and the law applicable to the state cause of action. Nonetheless, the law would still vary between states and would also vary from one federal court to another, so that even federal law would not be constant. Moreover, differences might still creep in between the state and federal causes of action in the same federal court

because the federal choice of law analysis might well differ from the state choice of law analysis. *See*, *e.g.*, *Harris*, 820 F.2d at 1004 & n.5 (applying federal common law choice of law rules to claim under the Foreign Sovereign Immunities Act, with result different from result under California choice of law rules).

In sum, the existence of the state causes of action would not only result in the inconsistent application of law to the same accident, but also would cause enormous confusion for airlines in predicting the law upon which they would be called to respond. It would sink federal courts into a Syrtis bog where they would not know whether they were at sea or on good, dry land, *see* J. Milton, *Paradise Lost*, Book II, *reprinted in* 4 Harvard Classics, *The Complete Poems of John Milton* at 134 (1909), when deciding what law a plaintiff can rely upon, what law the court itself should apply, and why. The problem might not seem especially grave if one looks solely to the orderliness already inherent in the Convention's presumption of airline liability and the $75,000 limit on individual recovery. But this surface unity ignores both the lurking legal chaos and the huge expenditure of time and expense in litigation over the choice of law, which would be inevitable if conflicting laws from various states were available in cases of willful misconduct.

D. *Other Case Law*

Although decisional law is divided on whether the Warsaw Convention permits a plaintiff to bring a state law claim otherwise governed by the Convention seeking punitive damages, the more reasoned opinions conclude as we do that such claims are barred by the Convention.

In *Harpalani*, 634 F. Supp. at 799, the District Court for the Northern District of Illinois held that allowing punitive damage awards would be inconsistent with the Convention's scheme of keeping compensation at a sufficiently low level to allow carriers to insure against losses, "both because carriers cannot insure against such awards, and because the purpose of punitive damages—to punish and deter . . . is unrelated to the signatories' goal of ensuring minimally adequate compensation." *Id.*, *disapproved of on other grounds in Wolgel v. Mexicana Airlines*, 821 F.2d 442, 445 (7th Cir.), *cert. denied*, 484 U.S. 927 (1987).

Other courts have found this argument persuasive. In *Floyd*, the Eleventh Circuit squarely held that allowing punitive damages in an action based on state law would "conflict with the scheme of liability provided for in the Warsaw Convention." 872 F.2d at 1485. *Floyd* noted that the entire tone of the Convention appears to be compensatory, not punitive. *Id.* at 1487. It rejected the argument that Article 25 itself created an action for punitive damages, *id.* at 1483-84, and held that the Convention was meant to compensate injured passengers, not to punish airlines. *Id.* at 1486. Therefore, though the court expressly declined to address whether the Convention creates an exclusive cause of action, it held that the plaintiffs could not recover punitive damages on their state law claims even if they could prove willful misconduct. *Id.* at 1486-89.

In re Air Crash Disaster at Gander, Newfoundland on Dec. 12, 1985, 684 F. Supp. 927 (W.D. Ky. 1987), reached the same conclusion. It held that "state law claims for punitive damages are pre-empted by the Convention to the extent that they would prevent the appli-

cation of the Convention's limitations." *Id.* at 932-33. *Cf. In Re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1308 (9th Cir. 1982) ("California law is preempted by the Warsaw Convention to the extent that California law would prevent the application of the Convention's limitation on liability").

Only two cases support the argument that punitive damages do not conflict with the Convention's purposes: *Hill v. United Airlines*, 550 F. Supp. 1048, 1054-56 (D. Kan. 1982); *In re Korean Airlines Disaster*, MDL 565 (D.D.C. 1989), *appeal docketed*, No. 89-5415 (D.C. Cir. Nov. 3, 1989). *Hill* stated only that the plaintiffs in that case had properly invoked the willful misconduct provision, which if proved "might entitle plaintiffs to recover actual and punitive damages," 550 F. Supp. at 1056, but this holding was not supported by any detailed reasoning. The presiding judge affirmed the jury award of punitive damages in *In re Korean Airlines Disaster* without opinion. *See* Buono, *The Recoverability of Punitive Damages Under the Warsaw Convention in Cases of Willful Misconduct: Is the Sky the Limit?*, 13 Fordham L. J. 570 (1990). Thus, those courts that have carefully analyzed whether punitive damages are recoverable under state law claims arising under the Convention have decided they are not recoverable.

E. *Analogous Supreme Court Case*

Although not precisely on point, *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), is analogous to the issue before us. In that case, Title II of the Ports and Waterways Safety Act of 1972 authorized the Secretary of the Department of Transportation to issue regulations respecting the design, construction and operation of oil

tankers, in order to ensure minimum standards of vessel safety and the protection of the marine environment. *Id.* at 161. The Secretary was required to inspect vessels and to issue certificates of compliance allowing the ship to carry the relevant cargo. *Id.* at 162-63. *Ray* read this statutory pattern as embodying Congress' aim to impose uniform national standards for the design and construction of oil tankers. *Id.* at 163-64. Among other things, the Court noted that Congress planned to have a uniform set of rules in an area that had traditionally been one in which international—rather than national—action was preferable because of the international nature of the problem of marine pollution. *Id.* at 166. It also noted that Congress included a provision requiring the Secretary to transmit his proposed rules to appropriate international forums "for consideration as international standards" and that several other requirements of the Act indicated that "Congress expressed a preference for international action." *Id.* at 167. The Supreme Court ruled therefore that the Act

> leaves no room for the States to impose different or stricter design requirements than those which Congress has enacted with the hope of having them internationally adopted or has accepted as the result of international accord. A state law in this area . . . would frustrate the congressional desire of achieving uniform, international standards and is thus at odds with 'the object sought to be obtained by [Title II] and the character of obligations imposed by it. . . .'

Id. at 168 (*quoting Rice*, 331 U.S. at 230).

Similarly, by adhering to the Convention, Congress expressed a preference for uniform, international rules.

The Convention also operates in an area in which such rules are required due to the international nature of the problem of carrier liability. State statutes governing wrongful death actions differ significantly as to the elements, measure, and distribution of damages. *See* 1 S. Speiser, *Recovery for Wrongful Death* § 1.9 at 29 (2d ed. 1975). The existence of differing laws in various states—particularly respecting punitive damages—would frustrate the Convention's aims of uniformity and certainty in the application of those international rules.

In sum, allowing each of the individual states to prescribe the elements of damage claims governed by the Convention would, as discussed above, "create potential frustration of national purposes." *San Diego Building Trades Council*, 359 U.S. at 244. We recognize there is a general presumption against finding preemption of state law, *see Motor Vehicle Mfrs. Ass'n of United States, Inc. v. Abrams*, 899 F.2d 1315, 1319 (2d Cir. 1990), but the existence of separate state causes of action conflicts so strongly with the uniform enforcement of the Treaty that in our view that presumption is overcome.

IV FEDERAL COMMON LAW

A. *Adopting Federal Common Law*

Because the Warsaw Convention preempts state law causes of action arising under it, we must next determine what law must be applied in deciding the claims before us. We look to the source of the right in order to determine the controlling law. *See Van Gemert v. Boeing Co.*, 553 F.2d 812, 813 (2d Cir. 1977). The source of the right to sue under the Convention is the Convention itself—a treaty that only the federal government has the

power to make. U.S. Const. art. II, § 2, cl. 2; art. I, § 10, cl. 1.

Consequently, the source of the right is federal law—in fact, *uniquely* federal law. It follows then the substantive law we must apply is also federal law. *See Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943); *Vintero Sales Corp.*, 629 F.2d at 795; *cf. DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193, 1201 n.12 (3d Cir. 1978) (noting that after *Benjamins*, when a plaintiff asserts a cause of action based on the Convention itself, "a federal court, not sitting in diversity, would not be bound by state substantive law and would be free to fashion" applicable rules of law "under federal law principles").

Two choices are generally available to a court in deciding the law created by a federal cause of action: adopting state law or creating a uniform federal common law. It would make little sense to adopt state law when uniform interpretation of the federal law is more consistent with the Convention's purposes. *Clearfield Trust* states that one of the primary considerations in determining whether federal courts should fashion federal law or merely adopt state law is the degree of need for national uniformity. *Clearfield Trust*, 318 U.S. at 367. Since, as a treaty, the Warsaw Convention is the Supreme Law of the Land, U.S. Const. art. VI, cl. 2, this federally-created cause of action should be construed exclusively under federal law. *See Block*, 386 F.2d at 337-38 (Convention is like a "uniform law" within the United States and court "has an obligation to keep interpretation as uniform as possible").

Other circuits agree. In *In re Mexico City*, 708 F.2d 400, the Ninth Circuit recognized the Convention's fed-

erally created cause of action and held "the questions of who are the persons entitled to assert that cause of action and what are their respective rights may be determined by reference to other federal statutes." *Id.* at 415. It left the task of determining the "most appropriate analog" to future courts. *Id.* The Fifth Circuit in *Boehringer-Mannheim* considered whether attorneys fees are recoverable "under federal law" in a Warsaw Convention action. *See* 737 F.2d at 459. Citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc.*, 421 U.S. 240, 247 (1975), it concluded they were not recoverable under the common law American Rule. *See also In re Korean Air Lines*, 704 F. Supp. at 1154 (applying federal common law to claim for jury trial under the Warsaw Convention and the Death on the High Seas Act). Thus, we adopt substantive federal common law as the law governing the cause of action under the Warsaw Convention.

B. *Nature of the Federal Cause of Action: Tort not Contract*

The next question is what is the type and content of this substantive law. Pan Am argues that we must interpret the Treaty in a manner consistent with the "shared expectations of the contracting parties," and that the framers of the Convention intended to create a cause of action sounding in contract. We do not doubt that the Convention was drafted against a civil law background that placed the cause of action in contract. *See Saks*, 470 U.S. at 399 (Convention was "drafted in French by continental jurists"); Miller, *Liability in International Air Transport*, at 235; Lowenfeld & Mendelsohn, at 498-500.

Nonetheless, the label "contract" is misleading, and of little use in determining the substance of the cause of action created by the Convention. The bodies of common and civil law of contract are not identical. Common law tends to classify damages intended to compensate or punish as sounding in tort, and any measure of damages meant to give the plaintiff the benefit for which he bargained as sounding in contract. Yet, under the French law governing a contract of carriage—which is the type of contract at issue here—the contract "can provide a basis for any action, be it wrongful death, personal injury, delay or damage to baggage or cargo." Miller, *Liability in International Air Transport* at 231. In fact, the primary result of placing the action in contract rather than negligence in French law is that the plaintiff need not prove negligence in order to recover for injuries stemming from an accident. *Id.* at 237 & n.19; Calkins, *The Cause of Action*, 26 J. Air L. & Com. at 219-20. Even the legal consequences of gross negligence fall under the rules of contract: "[u]nlimited liability in cases of *dol* or *faute lourde* [loosely translatable as gross negligence] is sometimes seen as having a tortious nature but, more often, it is analyzed as an aggravated liability which retains its contractual nature. The very rule that the liability limitations are set aside is itself considered as a rule of contractual liability." *Id.* at 234.

In searching for the appropriate source from which to draw federal common law, the closest analog is not contract, but tort law, for the causes of actions the Convention preempts are the types of claims the common law normally associates with the law of tort. Consequently, in the absence of a specific conflict between the Convention, as interpreted in the context of the shared expecta-

tions of the contracting parties, we look to the common law of tort in order to determine the elements of the cause of action under the Convention.

Federal common law of tort recognizes the right to a wrongful death recovery, *see Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 409 (1970), and allows an award of punitive damages, *see Smith*, 461 U.S. at 34-35, but solely to punish a defendant and deter certain kinds of conduct. *See Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 306 & n.9 (1986). Hence, because federal common law does not accord a right to recover for a compensatory element in a punitive damages claim, we need only decide whether the convention permits recovery of punitive damages to punish a defendant and deter certain kinds of conduct. With the inquiry thus focused, we turn now to the text of the Convention.

V THE TREATY

Ordinarily, we would start at the outset with the text of the Warsaw Convention in deciding whether it permits an award of punitive damages. But when, as in this case, the text does not address the question presented, we may—as in the earlier discussion—also examine the purposes for which the Convention came into being, its history, the negotiations leading to its adoption, and how the contracting parties have construed the Convention. *See Saks*, 470 U.S. at 396-97, 400, *citing Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943); *Chan*, 109 S. Ct. at 1683; *Fothergill v. Monarch Airlines Ltd.*, [1981] A.C. 251, [1980] 2 All. E.R. 696, [1980] 2 Lloyd's Rep. 295 (H.L.).

The Convention represents an entire liability scheme, and was intended to serve as a uniform, international

law. *See Block*, 386 F.2d at 337-38. As such, its terms should be read in that context, *see Reed*, 555 F.2d at 1083, and the words used should be given "a meaning consistent with the shared expectations of the contracting parties," *Saks*, 470 U.S. at 399, in order to more completely effectuate the Convention's purposes. *See Benjamins*, 572 F.2d at 917-18; *Eck v. United Arab Airlines, Inc.*, 360 F.2d 804, 812 (2d Cir. 1966); *cf. Day v. Trans World Airlines*, 528 F.2d 31, 38 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976). With this in mind, we turn to the text of the relevant Articles.

A. *Article 17*

1. *Text*. The provision that establishes a carrier's liability—Article 17—reads as follows in French, the official language of the Warsaw Convention:

> Le transporteur est responsable du dommage survenu en cas de mort, de blessure ou de toute autre lésion corporelle subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit à bord de l'aéronef ou au cours de toutes opérations d'embarquement et de debarquement.

The English translation of this Article, as set forth in the United States Code, is:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 U.S.C. app. § 1502 note.

The parties to the present litigation agree that the minutes and notes of the Convention shed no light on whether the drafters contemplated that a carrier's liability under Article 17 was limited to compensatory damages only. Liability under Article 17 was obviously meant to be limited to 125,000 francs by Article 22(1), and is now limited to $75,000 by the Montreal Agreement. Determining whether the Convention ever allows a recovery of punitive damages in cases it governs is the subject to which this opinion is directed.

2. *Examining "dommage survenu".* The first step in determining whether Article 17 contemplated punitive damages is to examine the legal meaning of the term the Article uses, "dommage survenu", to see if it excludes that possibility. *See Saks*, 470 U.S. at 399. Plaintiffs argue that "du dommage survenu" means "damages occurred" or "arrived" or "happened," not "sustained" and thus Article 17 contemplates punitive damages. Pan Am contends that the proper translation is "sustained," but that the exact translation does not matter because punitive damages do not "happen" or "occur" any more than they are sustained; rather punitive damages are imposed by a jury or a court.

We are convinced that the proper translation is "damage sustained" and deduce therefore that Article 17 contemplates monetary or compensatory damages only. The translation of "du dommage survenu" as "damage sustained" is the one made by the State Department and found in the United States Code, and it was the translation used in 1934 when the Convention was sent to the Senate for ratification. In addition, two later Conventions held to revise the Warsaw Convention used English as one of the official languages and both used the

"damage sustained" translation. *See* Protocol to Amend the Convention of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929. The Hague, Sept. 1955 (Hague Protocol); International Conference on Private Air Law, Guatemala City, Sept. 1961 (Guatemala Protocol). The United States Senate has not ratified either of these Protocols, so they provide no binding authority, but they are nonetheless evidence of the expectations of the contracting parties to the Convention.

The English courts have also interpreted "dommage survenu" as limited to monetary loss, *see Fothergill*, 2 Lloyd's Rep. at 299 (H.L.) (Lord Wilbeforce) ("in the *English text*, the word 'damage' in the Convention is used in more than one sense. Sometimes it means 'monetary loss'—for example in art. 17, or art. 19. Sometimes it means 'physical damage' e.g. art. 10.") (emphasis in original). The interpretation adopted by the English courts is entitled to some weight in our attempt to plumb the meaning of the Convention's ambiguous wording. *See Chan*, 109 S. Ct. at 1683; *Reed*, 555 F.2d at 1083; *Day*, 528 F.2d at 35. Moreover, the only two American cases that appear to have discussed this issue directly, have concluded that "dommage survenu" is entirely compensatory in tone. *See Floyd*, 872 F.2d at 1486-89; *In re Air Crash Disaster at Gander, Newfoundland*, 684 F. Supp. at 931.

Whatever the shades of meaning in the word "survenu", we agree that the way in which the Convention uses the term indicates that Article 17 refers to actual harm caused by an accident rather than generalized legal damages. The Article's later language—"subie par un voyaguer lorsque l'accident qui a caus le dommage" (lit-

erally, suffered by a traveller if the accident that caused the damage)—supports the compensatory interpretation of the term "du dommage survenu," because an accident does not "cause" punitive damages. *Cf. Saks*, 470 U.S. at 397-400 (discussing the concept of causation in Article 17).

The context within which the Convention was written adds further support to the conclusion that the damages contemplated by Article 17 are purely compensatory. Under civil law, as noted, an action under the Warsaw Convention sounds in contract. Punitive damages are generally not available in civil law contract actions. In fact, under the civil law they do not appear to be available at all. *See Cooperativa de Seguros Multiples de Puerto Rico v. San Juan*, 289 F. Supp. 858, 859-60 (D. Puerto Rico 1968); 2 M. Planiol & G. Ripert, *Treatise On the Civil Law*, Pt. 1, § 247 (trans. Louisiana St. Inst. with the authority of Librarie Generale de Droit et de Jurisprudence Paris, 11th Ed. 1939).

Plaintiffs nevertheless argue in support of their position that the national laws of many of the contracting parties allow the equivalent of punitive damages because they weigh the degree of fault in tort actions. Concededly, some civil law countries do consider the degree of fault in assessing damages, but these damages are generally "free from punitive considerations" and "can be reduced to the principle that plaintiff is entitled to adequate compensation or satisfaction for the mental harm." Stoll, *Penal Purposes in the Law of Tort*, 18 Am J. of Comp. L. 3, 4 (1970) (Stoll, *Penal Purposes*).

In German law, for instance, damages may be awarded to vindicate the plaintiff's "outraged sense of justice," but they are awarded to compensate the plain-

tiff, not to punish the defendant. *Id.* at 4-5. French law considers fault in those cases where it is awarding "dommage moral," or moral damages, which are usually equivalent to damages for pain and suffering, grief, shame, or disfiguration. Lowenfeld, *Aviation Law*, § 1.52 at 7-19 (2d ed. 1981); R. Mankiewicz, *The Liability Regime of the International Air Carrier* 157 (1981). Again, these damages are not intended to punish the defendant or to deter similar conduct.

Plaintiffs' response is that the Convention may not be construed solely with reference to civil law because England, a common law country, was also instrumental in drafting it. But there is no significant difference in wrongful death cases between the English law and the civil law of punitive damages. Like German and French law, English law may sometimes award aggravated damages to satisfy a plaintiff's sense of outrage, as in a libel case, but damages awarded for the purpose of punishing the defendant have always been rare in England. *See* Stoll, *Penal Purposes*, 18 Am. J. of Comp. L. at 4-5. Further, since adhering to the Convention, England has generally limited the recovery of punitive damages to unique and rare circumstances. *See Rookes v. Barnard*, [1964] 1 All E.R. 367, 410 (H.L.) (opinion of Lord Devlin). Thus, none of the original contracting parties to the Convention can reasonably be said to have shared any expectation that Article 17 would create liability for punitive damages.

Hence, the sum of the context in which the Article was written, the law of the contracting parties, subsequent interpretations, and the historical translation argue persuasively that Article 17 establishes liability for compensatory damages only, and that it would be incon-

sistent with the purposes of the Warsaw Convention to read Article 17 as permitting the recovery of punitive damages.

B. *Article 24(2)*

1. *Text.* Plaintiffs next contend that whatever the meaning of "dommage survenu," the Convention expressly left the types of recoverable damages to local law, in the same way that it left the question of contributory negligence and what parties could sue to local law. This argument is based on Article 24, which states

> (1) In the cases covered by articles 18 and 19 [baggage claims] any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
>
> (2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

49 U.S.C. app. § 1502 note.

An argument for the availability of state causes of action under the Convention—as distinguished from the availability of state causes of action outside the Convention, a possibility we rejected earlier—is that the language of the Convention itself preserves them. Article 24(1) provides that "any action for damages, however founded, can only be brought subject to the conditions and limits" of the Convention. This language is subject to two interpretations. The first is that a local cause of action (actions "however founded") may be brought, but that it is subject to the conditions and monetary lim-

its of the Convention. The second interpretation is that a plaintiff, whatever his damages, cannot circumvent the Convention by bringing any action other than one under Article 17.

Courts that have considered this language have not agreed on whether the cause of action created under the Convention was meant to be exclusive. *See Floyd*, 872 F.2d at 1482, n.33 (citing cases). Although the long list of cases cited by *Floyd* would seem to indicate otherwise, there is a paucity of direct authority on this question, with only the Fifth Circuit having directly ruled on it.

Again, plaintiffs and defendant agree there is no drafting history to indicate that the contracting parties intended this section to have any effect on the specific question of whether local law should govern on the issue of allowance of punitive damages. Plaintiffs insist that the last part of Article 24(2), "without prejudice as to . . . what are their respective rights," leaves the question of the elements of damages to local law and thereby effectively also directs the court's inquiry on the issue of punitive damages to local law. Pan Am views the phrase as intending to leave to local law only such questions as who is a proper plaintiff and the respective rights of beneficiaries regarding descent and distribution arising from the death of a passenger.

Commentators and case law are in accord that the Convention leaves the measure of damages to the internal law of parties to the Convention. *See Harris*, 820 F.2d at 1002 ("Evidently damages are to be measured according to the internal law of a party to the Convention"); *Mertens*, 341 F.2d at 858 ("It seems clear that the Warsaw Convention left [the issue of which items of

damage can be properly included in the award—e.g. mental anguish], as it did other issues, such as who are the proper beneficiaries of a damage award, to the internal law of the parties to the Convention.''); Miller, *Liability in International Air Transport* at 117; Drion, *Limitation of Liabilities* at 125-26; N. Matte, *Treatise on Air-Aeronautical Law* 383 (1981). None of these authorities seems to have considered whether the ''type'' of compensable damages left to local law could include punitive damages. When the *Harris* court applied Polish law to the calculation of damages, it did not mention punitive damages, but only referred to the way in which pecuniary loss, such as funeral expenses and lost financial support to the survivors, should be calculated. *See Harris*, 820 F.2d at 1004-05. Nor did either of the other courts suggest that in mentioning the ''types'' or ''elements'' of a damage award they meant anything more than how to calculate compensatory damages.

2. *Drafting History.* The drafting history of Article 24 indicates that the cited clause was primarily aimed at questions of descent and distribution. The initial draft, prepared at the 1925 Paris conference, provided:

> In case of decease of a passenger carried, the lawsuit regarding responsibility may be taken by the persons who have a right to take such action according to the law of the land of the deceased person but under the reserve of the limitation of responsibility provided for in the foregoing article.

International Conference on Private Aviation Law (Paris 1926) (State Department Translation) Addendum at 12a. The accompanying official report stated that:

> There is a need to determine exactly the extent of the rights of legal claimants for, depending on the national laws, the nature of their rights could lead to an interpretation different from the legal basis and somehow cancel the limitation set by the preliminary project. Since it is impossible to set in a single formula the various legal concepts of the various States, it appeared simpler to specify in Article 8 that the claimants would be determined according to the national law of the deceased, but that the rights of these persons would be limited to the maximum sum allowed by Article 7.

International Conference on Private Aviation Law (Paris 1926) Addendum at 7a.

As this report plainly states, the drafters' primary concern stemmed from the fact that the laws of descent regarding a person's ability to claim damages in a wrongful death action vary widely according to national laws. *See* Haanappel, *The Right to Sue in Death Cases under the Warsaw Convention*, 6 Air. L. 66, 69-70 (1981); Mankiewicz, *The Liability Regime of the International Air Carrier* at 161-66. For example, in France the decedent's heirs inherit the right to sue on the decedent's behalf, but close family members and even a divorced spouse have the right to sue for personal damages. Haanappel, *The Right to Sue*, 6 Air L. at 73. It was feared by the drafters that if the heirs brought a contractual action, but those entitled to sue for personal damages brought tort actions, the sum of the actions might exceed the liability limit imposed by the Convention. *See* Drion, *Limitation of Liabilities* at 71-72. Thus, in recognition of the widely varying laws of descent, the drafters gave up any attempt to decide who could sue

and on what legal basis, but instead explicitly provided that no matter how many plaintiffs were involved or what their rights were under local law, in no event could the sum total of recovery exceed the Convention's liability limit.

A draft convention in 1928 changed the provision to read:

> In the event of death of the holder of the right, any action in liability, however founded, can be exercised . . . by the persons to whom this action belongs according to the national law of the deceased or, in the absence hereof [sic], according to the law of his last domicile.

CITEJA Report, 3d Session, May 1928, *quoted in* Haanappel, *The Right to Sue*, 6 Air L. at 67. Discussions held during the next two years led the drafters to abandon the choice of law rule favoring the decedent's domicile, thus leaving both the choice of law and the question of the rights of legal claimants to "general principles of private international law and to the internal legislation of States." *Id.* at 67; *see* Drion, *Limitation of Liabilities* at 126. The Final CITEJA Report drafted by the official Reporter for the Convention, Henri deVos, stated

> The question was asked of knowing if one could determine who are the persons upon whom the action devolves in the case of death are, and what are the damages subject to reparation. It was not possible to find a satisfactory solution to this double problem, and the CITEJA esteemed that this question of private international law should be regulated independently from the present Convention.

Report of Henri deVos, CITEJA Reporter (September 1928), *translated and reprinted in* Second International Conference on Private Aeronautical Law, p. 255 (R. Horner & D. Legrez trans. 1975).

Nothing in this drafting history suggests that the drafters ever considered that they might be allowing a contracting party to impose punitive damages. DeVos's use of the word "reparation" tends to exclude the concept of punitive damages, as does the nature of the liability created by Article 17—found earlier to be purely compensatory. Hence, the drafting history of Article 24, together with the civil law background of the Convention, make it extremely unlikely that Article 24(2) was intended by its drafters to preserve a common law right to punitive damages.

The drafters' silence on this subject leads logically to the assumption that punitive damages were not addressed because they were never contemplated. The plaintiffs maintain that the fact that the Convention never referred to punitive damages is without significance because the Convention left the calculation of damages to local law, and did not need therefore to address the subject. Yet, there can be no doubt that had the question been raised it would have been hotly debated, especially since the concept is unique to the common law, and also because many of the airlines were state-owned. Again, nothing in the Convention's drafting history points to the drafters contemplating that the Convention would be used to punish or deter tortious behavior on the part of airlines. Rather, all of the drafters' actions point to the conclusion that they sought to limit recovery simply to compensation.

3. *Other Authority on Article 24.* As is evident, the case law on this topic is remarkably sparse, and what little exists is short on analysis. Commentators also provide little help. According to the Chief United States' delegate to the Hague Conference—a later Convention held to modify the liability limitations of the Warsaw Convention—the drafters of Article 24 discussed the possibility of tort suits during preliminary discussions and "no attempt was made by the framers of the Convention to outlaw the right of a plaintiff . . . to bring an action in tort." Calkins, *The Cause of Action*, 26 J. Air L. & Comm. at 327-28. Pan Am points out that this conclusion was based on comments by the French delegate, M. Ripert, but that the French have interpreted the Treaty as creating an exclusive cause of action. *See* Miller, *Liability in International Air Transport* at 237 (French court held "the convention had established a liability regime which excluded any action based on other principles."). In any event, it is possible that the phrase "however founded" was simply intended to prevent an injured party's relatives from bringing an independent action, outside the contract action which the injured person himself might bring, for loss of support. *See* Drion, *Limitation of Liabilities* at 71.

C. *Article 25*

1. *Willful Misconduct.* Discussion now turns to whether punitive damage claims are contemplated by the Convention under the willful misconduct language of Article 25, and thus form part of the damages recoverable under the federal action. Plaintiffs assert that even if Article 17 does not allow recovery of punitive damages, that provision becomes inoperative in the event of

the carrier's willful misconduct under Article 25 since the Article is then a "limitation or exclusion".

We conclude that Article 17 is not one of the limitations or exclusions to which Article 25 refers; Article 25 voids only certain provisions in the event of willful misconduct, but the rest of the Convention remains fully operative, and the Convention as it then remains still is inconsistent with the notion of a punitive damages recovery. An examination of the inconsistency between punitive damages and the accomplishment of the purposes of the Convention demonstrates that the shared expectations of the drafters did not include the recovery of punitive damages, even in the event of willful misconduct.

2. *Lifting of Liability Limitations.* Article 25 provides as follows:

> The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his willful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to willful misconduct.

49 U.S.C. app. § 1502 note.

Plaintiffs make two related arguments in support of their position that Article 25 allows punitive damages claims in cases of willful misconduct. First, plaintiffs contend that, by lifting the $75,000 limit on damages, Article 25 lifts any and all limitations on damages. Next, plaintiffs insist that Article 17—when read to create a cause of action for compensatory damages and to preempt pre-existing state causes of action that included

recovery of punitive damages—functions as a limitation on a plaintiff's recovery. In effect, Article 17 bars a plaintiff from seeking the punitive damages to which he or she would have been entitled had the United States never ratified the Warsaw Convention. Therefore, plaintiffs continue, Article 17 is a limitation on a carrier's liability that must be lifted when the carrier is guilty of willful misconduct.

In support of their first argument, plaintiffs point out that both the provisions of Article 25 and the right to recover punitive damages under American tort law are triggered by a defendant's willful misconduct. *See* 22 Am. Jur. 2d *Damages* § 764 (1988). Hence, it seems natural to believe, they add, that the purposes of Article 25 bear some relation to those of punitive damages and that punitive damages are implicitly authorized by Article 25. Quite the contrary, we think lifting the monetary limit on compensatory damages is the Convention's sole response to willful misconduct, and that it stems not from the wish to punish the defendant but from the idea that a party cannot rely on exclusions to escape from his own wrongdoing. Drion, *Limitation of Liabilities* at 262.

The idea of deterrence is inherent in both concepts, but it would be a mistake to conclude that the presence of a civil law concept necessarily authorizes the application of a superficially similar, but actually different, common law concept. In fact, the civil law appears to judge that the award of full compensatory damages alone is sufficient to deter willful misconduct, so punitive damages would be both excessive and redundant. Thus, "[f]or the carrier the consequences of an air accident are such that there would seem to be little need for

an additional incentive to prevent such accidents by increasing his liability towards passengers and shippers." *Id.* at 211.

Moreover, even when the liability limit is eliminated, the rest of the Convention still governs the action. *Id.* at 261; *cf.* D. Goedhuis, *National Airlegislations and the Warsaw Convention* 155-56 (1937) (similar to willful misconduct, irregularity in traffic documents results in unavailability of provisions that limit or exclude the carrier's liability, but this "in no way implies that all the rules of the Warsaw Convention should no longer be applied . . . all the rules remain in force except those that limit or exclude" liability). Consequently, when the Convention refers to terms that limit or exclude liability, it refers solely to terms within the Convention itself, as conceived by the contracting parties. *See* Drion, *Limitation of Liabilities* at 261. As to plaintiffs' second argument that Article 17 functions as a limitation on liability, it is settled that Article 25's reference to provisions that "exclude or limit" liability includes at least Articles 20(1) (due diligence and impossibility defenses) and 22(1) (monetary limits) of the Convention. *See Molitch v. Irish Int'l Airlines*, 436 F.2d 42, 44 & n.1 (2d Cir. 1970); *Grey v. American Airlines*, 227 F.2d 282, 285 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956). Which of the other provisions are included is in doubt. One commentator includes both Article 21 (contributory negligence), and Article 26(4) (statute of limitations for baggage and cargo), Shawcross & Beaumont, *Air Law*, VII(213) (4th ed. 1990). Article 25, however, does not lift every limit on a carrier's liability. For example, it does not lift Article 29's statute of limitations. *See Molitch*, 436 F.2d at 44. No authority has been cited by

plaintiffs for the proposition that Article 25 refers to Article 17.

As noted above, Article 25 only refers to terms within the Convention. The framers, looking at the Convention from the background of the civil law, saw Article 17 as a means of creating liability or at the very least shifting the burden of proof to the carrier. Article 17 was not envisioned as a limit or exclusion of liability because, to a civil lawyer unfamiliar with the concept of punitive damages, Article 17 does not appear to limit liability in any way. For us to impose a common law view on the document, twisting the apple to appear to be an orange, would violate principles of Treaty interpretation.

A counterpart to Article 25 is found in many civil law countries that have statutory limits on personal injury recoveries from common carriers. For example, Mexico, El Salvador, Guatemala and Argentina all have various liability limits according to the gravity of the injury, but all provide that when the accident is due to "dolo," the Spanish equivalent of "dol," then the liability is unlimited. Cagle, *The Role of Choice of Law in Determining Damages for International Aviation Accidents*, 51 J. Air L. & Com. 953, 966-70 (1986) (Cagle, *The Role of Choice of Law*). Nevertheless, none of these countries allow plaintiffs to recover punitive damages as well as unlimited compensatory damages when the liability limit is lifted.

While Article 25 has been the subject of negotiations regarding its revision, and has been criticized as unclear, *see* Lowenfeld & Mendelsohn, at 503, 505, these later negotiations bear out the conclusion that the parties did not believe the Convention allowed for punitive damages. In the 1960's, when the United States gave notice

of denunciation of the Convention because of its low limits on victim compensation, and then negotiated the Montreal Accord with various international air carriers, much of the debate among the delegates at the negotiating sessions centered around the proper level of compensation. *See, e.g.*, Lowenfeld & Mendelsohn, at 565-66. Amidst all this talk of what a plaintiff might recover, none of the delegates, including those from the United States, raised a question regarding the possible availability of punitive damages. *See generally id.* (detailing the negotiating history of the Montreal Accord).

Similarly, the Guatemala Protocol to the Warsaw Convention—which the United States has not ratified—basically eliminated Article 25, raising the liability limit to 1,500,000 francs per passenger but making that limit apply even in the event of the carrier's willful misconduct. Cagle, *The Role of Choice of Law*, 51 J. Air L. & Com. at 989. Because the Guatemala Protocol would not even allow unlimited compensatory damages, it follows *a fortiori* that the contracting parties to the Convention did not contemplate punitive damages. Moreover, all of the negotiation preceding the action concerned the circumstances in which Article 25 comes into play and about how to translate the concept of *dol* into English, not about the extent of the carrier's liability once the Article was invoked. *See* Miller, *Liability in International Air Transport* at 78. The absence of the dispute, particularly in the context of the civil law, evinces an assumption that Article 25's "unlimited liability" meant only unlimited compensatory liability.

VI POLICY CONSIDERATIONS

Finally, consideration of the purposes behind the Convention compel the conclusion that the shared expectations of the Convention's drafters did not contemplate that punitive damages be available under the Convention. Although the Convention's language must be construed in a way to avoid impairing pre-existing rights such as the right to punitive damages, if reasonably possible, *see, e.g., Guaranty Trust Co. v. United States*, 304 U.S. 126, 143 (1938); *Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 304-05 (1959), an examination of this question in light of the Convention's purposes is persuasive proof that the drafters—and the United States when it adhered to the Convention—could not have intended to permit a right to obtain punitive damages. Interpreting the Convention to allow such recovery would severely hobble most of the aims the Convention sought to accomplish: establishing a uniform carrier liability regime, limiting carrier liability to ensure a viable industry, ensuring the carriers' ability to insure against losses, and adequately compensating injured passengers quickly and with a minimum of litigation. We discuss briefly some of those policies.

A. *Uniformity*

Allowing punitive damages would undoubtedly destroy uniformity. No other signatory allows them. The Convention should be read to further its purposes to the greatest extent possible, and one of its primary purposes was to achieve uniformity in the liability and amount of damages awardable. No authority that we have unearthed demonstrates that any other country has

awarded punitive damages under the Convention. The goal of uniformity "would be greatly defeated if it were left to the national legislator" to set aside all other provisions of the Convention and replace the Convention with national law in the case of willful misconduct. Drion, *Limitation of Liabilities* at 261. Were the United States alone to allow such recoveries, it would act as a magnet so that every airline injury claim would, if possible, be brought in the United States. The enormous difference between the damages recoverable here and those recoverable in other forums would thereby destroy much of the value of the Convention.

B. *Carriers' Ability to Insure Against Losses*

Allowing punitive damages recoveries might well also defeat the goal of making airlines insurable. First, airlines might not be able to obtain such insurance because a number of states have traditionally barred insurance coverage of punitive damages on the theory that such coverage is contrary to public policy because it lessens the defendant's incentive to take reasonable care or at least not to commit willful misconduct. *See* Mooney, *The Liability Crisis—A Perspective*, 32 Vill. L. Rev. 1235, 1237-38 & n.9 (1987) (Mooney, *The Liability Crisis*); Comment, *Punitive Damages: The Burden of Proof Required by Procedural Due Process*, 22 U.S.F L. Rev. 99, 102 & n.8 (1987). If an airline could not find an insurer able or willing to sell insurance for punitive damages, it might well choose to go out of business, or at least out of the international market, rather than risk bankruptcy with every flight.

Second, even if the airline industry could obtain such insurance, the cost of a ticket would skyrocket in

response to the higher cost of such insurance. *Cf.* Mooney, *The Liability Crisis* at 1259 (in Canada, which has caps on non-economic awards, the average premium is one third that of the average premium in the United States). The extra costs of higher insurance, plus the uninsurable risks, would increase the costs of airlines overall and could—as currently escalating fuel costs have demonstrated—contribute to the downfall of an airline teetering on the edge of insolvency. It is also likely that punitive damages recoveries would inhibit innovation in the industry. *Cf. Browning-Ferris*, 109 S. Ct. at 2924 (O'Connor, J. concurring in part and dissenting in part) ("designers of airplanes and motor vehicles have been forced to abandon new projects for fear of lawsuit that can often lead to awards of punitive damages"), *citing* P. Huber, *Liability: The Legal Revolution and Its Consequences* 152-171 (1988).

In addition, insurance companies would have a difficult task calculating how much to charge its insureds because punitive damages are left to the discretion of the judge and the jury and vary not only according to the gravity of the conduct but also according to the defendant's wealth. 22 Am. Jur. *Damages* §§ 739, 806, 807. Thus, the wealthier the airline, the more likely the punitive damage award will be high. *See* Belli, *Punitive Damages*, 49 UMKC L. Rev. at 13. The resulting unpredictability of punitive damages awards has caused difficulties in other sectors of the insurance industry. *See* Mooney, *The Liability Crisis*, 32 Vill. L. Rev. at 1258, 1260. The goal of ensuring a viable airline industry to foster commerce and make international travel more extensive and accessible would be seriously undermined by allowing punitive damages.

C. *Compensating Plaintiffs Quickly with a Minimum of Litigation*

Again, punitive damages recoveries would increase litigation in general because every plaintiff would claim willful misconduct. The drafters were aware that allowing a plaintiff to escape all liability limitations merely upon an allegation of willful misconduct would "in every case . . . permit the plaintiff to bother the carrier." Minutes and Documents, CITEJA, Third Session, Madrid, 1928, at 53-54 (Remarks of Mr. Richter), *quoted in* Calkins, *The Cause of Action* 26 J. Air L. & Com. at 226. Precisely because punitive damages recoveries are unpredictable, there is greater incentive to litigate a case to the end rather than settle. *See* Comment, *Punitive Damages*, 22 U.S.F.L. Rev. at 102; Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 45-46 (1982).

Despite the benefit to some plaintiffs who would recover such awards, other plaintiffs would be required to go through years of litigation to obtain awards whose value would be much reduced by litigation costs and the passage of time. *See* Lowenfeld & Mendelsohn at 600. In sum, the goal of discouraging litigation, along with all of the other major goals of the Convention, is inconsistent with the recovery of punitive damages.

CONCLUSION

Although the analysis required to reach it has been extensive, the position we take is simple: punitive damages are not recoverable in actions governed by the Warsaw Convention. Therefore, the judgment of the court in Joshi v. Pan American World Airways, Inc., denying

partial summary judgment on the motion to dismiss plaintiffs' claims for punitive damages is reversed and the claims for punitive damages are dismissed. The judgment of the court in Rein v. Pan American World Airways, Inc., dismissing plaintiffs' punitive damage claims, is affirmed.

B1

Memorandum and Order

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MDL 799
ENTERED January 3, 1990

IN RE: AIR DISASTER IN LOCKERBIE, SCOTLAND, ON DECEMBER 21, 1988

PLATT, Chief Judge

Defendants, Pan American World Airways, Inc. ("Pan Am"), Alert Management Systems, Inc. ("Alert"), Pan Am World Services ("PAWS"), and Pan Am Corporation ("Pan Am Corp.") move for partial summary judgment dismissing all punitive damage claims on the ground that punitive damages are barred by the Warsaw Convention[1]. In response, plaintiffs argue that the Warsaw Convention does not bar punitive damage claims and, if this Court were to hold that the Warsaw Convention bars punitive damages, then plaintiffs should be allowed additional discovery in order to demonstrate that plaintiffs' claims against defendants Alert and PAWS are not governed by the Warsaw Convention.

RELEVANT FACTS

On December 21, 1988, Pan Am Flight 103 crashed near Lockerbie, Scotland. Flight 103 originated at Frankfurt Main Airport in Frankfurt, West Germany, and flew non-stop to Heathrow Airport in London, England. After stopping at Heathrow Airport, the flight departed for New York's John

1 Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted* in Note following 49 U.S.C.App. § 1502.

F. Kennedy International Airport. At approximately 7:19 p.m. Greenwich mean time, the aircraft exploded in midair and crashed near Lockerbie, Scotland. On the plane were 45 passengers who boarded in Frankfurt, 198 passengers who boarded in London and 16 crew members. All 259 persons died on board.

Survivors of the victims filed suit against Pan Am, PAWS, Alert, and Pan Am Corp. in several Federal District Courts. On April 4, 1989, the Judicial Panel on Multidistrict Litigation, pursuant to 28 U.S.C. § 1407, transferred all suits brought by the decedents' representatives to the undersigned in the Eastern District of New York for consolidated pretrial proceedings.

In these suits, plaintiffs assert claims against defendant Pan Am seeking compensatory damages for defendant's wilful misconduct and breach of contract and punitive damages for defendant's wilful misconduct. The complaints assert that federal subject matter jurisdiction over these claims exists on the basis of 28 U.S.C. § 1331 and the Warsaw Convention.

Plaintiffs also assert claims against defendants PAWS and Alert seeking compensatory and punitive damages for defendants' negligence and wilful misconduct. Subject matter jurisdiction over these claims is based on the federal court's pendent or ancillary jurisdiction.

DISCUSSION

Because plaintiffs maintain that additional discovery is needed in order to determine whether defendants Alert and PAWS are governed by the Warsaw Convention, this Court will only address the issue of whether the Warsaw Convention bars punitive damage claims.[2]

---

2 If defendants PAWS and Alert are not governed by the Warsaw Convention, it is doubtful that this Court has subject matter jurisdiction over those plaintiffs who lack diversity. The recent Supreme Court decision of *Finley v. U.S.*, ___ U.S. ___, 109 S.Ct. 2003 (1989), held

Defendants argue that the Warsaw Convention in Article 17 limits the right of recovery to compensatory damages only and any exclusion from limitation provided in Article 25 is an exception to the monetary limit on the recovery of compensatory damages. According to defendants, Article 25 does not authorize the recovery of any damages other than compensatory.[3]

In response, plaintiffs present a two fold argument. First, they contend that the Warsaw Convention provides that a number of issues including punitive damage claims are to be determined according to the law of the forum State; thus, punitive damage claims are only barred under the Warsaw Convention when barred by local law. Second, plaintiffs argue that even if the Warsaw Convention generally bars punitive damage claims, Article 25 provides that when wilful misconduct exists, the liability limits of the Warsaw Convention are inapplicable and thus if wilful misconduct exists plaintiffs' punitive damage claims should be determined by referring to local law.

While the Warsaw Convention does not expressly refer to punitive damage claims, it appears that the Warsaw Convention bars such claims whether or not wilful misconduct exists. The Supreme Court has recently explained that, in interpreting the Warsaw Convention, courts are obligated "to give the specific words of the treaty *a meaning consistent with the shared expectations of the contracting parties.*" *Air France v. Saks*, 470 U.S. 392, 399 (1985) (emphasis added).

---

that no pendent party jurisdiction existed over the San Diego Gas and Electric Company and the city of San Diego despite the fact that the plaintiffs had sued the defendant, the United States, in federal court pursuant to the Federal Torts Claims Act which grants the federal courts exclusive jurisdiction over such claims. Thus, it is certainly questionable whether this Court's jurisdiction over Pan Am pursuant to the Warsaw Convention would give this Court pendent party jurisdiction over PAWS or Alert.

3 Defendants maintain that if Article 25 applies to plaintiffs, then plaintiffs may be entitled to full compensatory damages rather than the mere $75,000 provided in Article 22 as modified by the Montreal Agreement but plaintiffs are never entitled to punitive damages.

The primary shared expectation of the contracting parties was to set some uniform limit on an airline carrier's liability in order to promote the civil aviation industry which at the time of the Warsaw Convention was in its infancy. *See Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 256 (1984); *Reed v. Wiser*, 555 F.2d 1079, 1089 (2d Cir. 1977); *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1467 (11th Cir. 1989); Andreas Lowenfeld and Allan I. Mendelsohn, *The United States and The Warsaw Convention*, 80 Harv.L.Rev. 497, 499 (1967). This primary goal is clearly evidenced by Secretary of State Cordell Hull's transmittal of the Warsaw Convention to the United States Senate. Secretary of State Hull wrote:[4]

> It is believed that the principle of limitation of liability will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation, but that it will prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expenses for the carrier and advantages to travelers and shippers in the way of reduced transportation charges.

Since the application of local law to punitive damage claim would be inconsistent with the primary goal of the Warsaw Convention, this Court may not find that the treaty's mere silence authorized punitive damage claims to be governed by local law; in order for a court to find that a provision inconsistent with the entire scheme of the Warsaw Convention exists, the provision would have to be express and explicit.[5] *See Floyd.*

---

4 Senate Comm. on Foreign Relations, "Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules", Sen. Exec. Doc. No. G, 73rd Cong., 2d Sess. 3-4 (1934).

5 At one point, plaintiffs suggest that since the Warsaw Convention expressly states that questions of procedure, the effect of contributory

Plaintiffs maintain that the Warsaw Convention in Article 24 does expressly provide for local law to be applied to any punitive damage claim. Article 24 states:

> (1) In cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
>
> (2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.[6]

Plaintiffs ask this Court to read the provision in paragraph (1) stating that "any actions for damages, *however founded*, can only be brought subject to the conditions and limits set out in this convention" in combination with provision in paragraph (2) stating that actions under Article 17 be brought subject to the convention "*without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.*" (emphasis added). They argue that by the combination of these two provisions the

---

negligence, and the method of calculating the statute of limitations are to be determined by looking at local law, it is probable that the Warsaw Convention also intended to leave punitive damage claims to local law even if it was silent on the issue. Plaintiffs contend that this argument is supported by the fact that many of the signing nations allowed for various types of punitive damage claims. However, that the Warsaw Convention was silent on whether punitive damage claims should be governed by local law while expressly providing for those other issues to be determined by reference to local law actually runs against the argument that the Warsaw Convention intended punitive damage claims to be governed by local law. Because the application of various local laws to punitive damage claims would be a greater hindrance to the Warsaw Convention's primary goal of uniform and limited liability than the application of local laws to the questions of procedure, contributory negligence, or the statute of limitations, it seems the Warsaw Convention would have certainly expressly provided if punitive damage claims were to be governed by local laws.

6 Article 18 provides a cause of action for damage to property while Article 17 provides a cause of action for death or bodily injury.

Warsaw Convention provided that punitive damage claims would be determined by reference to local law.

However, Article 24 actually seems to be persuasive evidence that the Warsaw Convention intended to bar punitive damage claims. The provision in paragraph (1) that actions "however founded" be "subject to the conditions and limits set out by this convention" appears to emphasize the Warsaw Convention's intent that all actions be governed by the Warsaw Convention's uniform limit of liability and thus actually precludes any other actions including those founded in State law. The Eleventh Circuit, in *Floyd v. Eastern Airlines, Inc.*, employed similar reasoning in addresssing the issue of whether a State cause of action for punitive damages was preempted by the Warsaw Convention. There, the Court held that despite the Warsaw Convention's silence on the subject, the plaintiffs could not bring punitive damage claims under State law because Article 24 of the Convention required the Court to determine whether such a State cause of action would be within the "conditions and limits set out in this convention" and a State cause of action for punitive damages would directly contravene the liability limits set out in the treaty. *Floyd*, at 1480-1481.

The provision that "all actions *however founded* be brought subject to the conditions and limits of the convention" is unaltered by the provision in paragraph (2) that "in cases covered by Article 17 the provisions of the preceding paragraph shall also apply *without prejudice as to who are persons who have the right to bring suit and what are their respective rights*". (emphasis added). Plaintiffs maintain that if the provision that all actions however founded be subject to the Warsaw Convention is considered together with the natural meaning of paragraph (2), Article 24 actually authorizes punitive damage claims to be governed by local law. However, the natural meaning of paragraph (2) seems to be additional evidence that the Warsaw Convention does not allow for any punitive damage claims. It expressly states that even actions for personal injury and death, governed by Article 17, must comply with the conditions and limits of the Warsaw Convention. Further, it seems quite obvious that the

natural meaning of the "without prejudice" clause is that the Warsaw Convention would not interfere with local laws of descent and distribution; the "without prejudice" clause of Article 24 simply provides that the limited amount obtained under the Warsaw Convention would be distributed between heirs and next of kin according to local law.

Plaintiffs next argue that even if Article 24 does not authorize punitive damage claims brought under the Warsaw Convention to be generally governed by reference to local law, Article 25 authorizes punitive damage claims to be governed by local law in cases where wilful misconduct exists. According to plaintiffs, Article 25 provides that the airline loses the benefit of anything in the Warsaw Convention that excludes or limits liability when wilful misconduct exists.

Article 25 explicitly provides that "the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability if the damage is caused by his wilful misconduct." Plaintiffs maintain that the drafters intended to deter wilful misconduct and thus both the specific monetary limit provided by the Warsaw Convention and the Warsaw Convention's general scheme that only compensatory damages would be provided are disallowed where wilful misconduct exists. Taken alone, the language in Article 25 may be interpreted to mean that one who engaged in wilful misconduct would not benefit from either the specific monetary limit set by the Warsaw Convention or the general plan to limit liability to compensatory damages.

However, as the Eleventh Circuit noted in *Floyd v. Eastern Airlines, Inc.*, "minutes of the negotiations on the Hague Protocol, an amendment to the Convention, indicate that the delegates understood article 25 as referring only to article 22 which establishes monetary limits for recoveries under the Convention." *Floyd*, at 1483 (the *Floyd* Court held that Article 25 did not provide an independent cause of action for punitive damage claims); *see also* H. Drion, *Limitation of Liabilities in International Air Law* 70, 260-61 (1954). Moreover, since allowing the application of various punitive damage laws would defeat the Warsaw Convention's primary goal of uniform and limited liability, Article 25 may not be inter-

preted as authorizing an independent cause of action for punitive damage claims and be consistent with the shared expectations of the parties. It seems more likely that if the parties intended that carriers which engaged in wilful misconduct would be subject to punitive damage claims, Article 25 would have provided that the entire Warsaw Convention, rather than just certain provisions, was inapplicable in such cases. Since Article 25 does not provide an independent cause of action for punitive damage claims, plaintiffs who brought their suit under the Warsaw Convention must resort to Article 17 which provides the cause of action for death or bodily injury under the Warsaw Convention.[7] *See Benjamins v. British European Airways*, 572 F.2d. 913, 916 (2d. Cir. 1978) (the Court reversed previous Second Circuit caselaw and held that Article 17 created a cause of action).

Since Article 17 provides plaintiffs' cause of action, plaintiffs may not obtain punitive damages even if wilful misconduct exists. The official American translation of Article 17, which was before the Senate when it ratified the Convention in 1934, reads:

> "The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any operations of embarking or disembarking." 49 Stat. 3018-3019.

Plaintiffs argue that "damage sustained" is an incorrect translation of the original French phrase "du dommage survenu."[8] According to plaintiffs, the proper translation of the

---

7 While plaintiffs with diversity may attempt to bring a punitive damage suit under a State law cause of action, the Eleventh Circuit in *Floyd*, supra, held that Article 24 of the Warsaw Convention requires that a State cause of action for punitive damages is precluded by the Warsaw Convention.

8 The French text of Article 17 reads:

"Le transporteur est responsable du dommage survenu en cas de mort, de blessure ou de toute autre lesion corporelle subie par un

French "dommage survenu" is damage which "happened" or "arose" and such a translation would allow for punitive damage claims.[9]

The Eleventh Circuit, in *Floyd*, held that "dommage survenu" is accurately translated as "damage sustained"[10] and that punitive damages are not damages sustained but rather an award, over and above what is necessary to compensate a plaintiff for damage sustained, designed to punish a defendant for his conduct and to deter others from engaging in similar conduct in the future. *Floyd*, at 1486-1487. (*citing In Re Air Crash Disaster at Gander, Newfoundland*, 684

---

voyageur lorsque l'accident qui a cause le dommage s'est produit a bord de l'aeronef ou au cours de toutes operations d'embarquement et de debarquement."

9 Plaintiffs maintain that if there is a conflict between the original French and the accepted English translation, the original French governs. While the Supreme Court has indicated that the original French would govern over a long accepted but improper English translation, it has explained that this is not because " 'we are forever chained to French law' but because it is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Air France v. Saks*, 470 U.S. 392, 399 (*quoting Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d 385 (1974)). Therefore, in light of the Warsaw Convention's primary goal that carrier liability be uniform and limited, it seems highly unlikely that "du dommage survenu" may be interpreted in a manner which would allow for punitive damage suits. In support of their argument that the proper translation of "du dommage survenu" would allow for punitive damage claims, plaintiffs again point out that at the time of the Warsaw Convention, many countries allowed for various types of punitive damage claims. However, as stated above, that many of the signing nations allowed for varying punitive damage claims only further supports the position that a treaty which intended to establish a uniform limited liability precluded these local laws from applying.

10 The Court noted that the official English translation adopted at The Hague in 1955, the United States State Department translation which accompanied the Convention when it was ratified by the Senate, and the Guatemala Protocol all used the "damage sustained" language. *Floyd*, at 1487 (*citing* 49 U.S.C. note following § 1502 (American translation), Kreindler, Aviation Law Documents Supp. at 955,975 (official English translation, Guatemala Protocol).

F.Supp. 927, 931 (W.D.Ky. 1987) (*citing International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1981); Prosser and Keeton on Torts § 2 at 9-15 (5th ed. 1984))).

Plaintiffs nonetheless argue that the *Floyd* Court erred in not recognizing that the original French phrase "du dommage survenu" is more properly translated as damage which "happened" or "arose". In this Court's own survey of French-English dictionaries, "survenir" was found to be most frequently translated as "to happen", "to arise", or "to arrive unexpectedly".[11] However, even if "du dommage survenu" is translated as damage happened or arisen, Article 17 does not allow for punitive damage claims. Under a literal translation, Article 17 would provide that the transporter or carrier is responsible for damage, not damages, happened or arisen in the case of death, wounding, or any other bodily injury if the accident which caused the damage, not damages, took place on board. "Damage" in the context of Article 17 is damage or injury sustained, happened or arisen to the body or mind of the passenger, not monetary damages, and hence, regardless of whether "survenu" is translated as sustained or happened or arisen, Article 17 does not allow for punitive damage claims. *See accord Air France v. Saks*, 470 U.S. 392 (1985) (while the issue before the Court in *Air France* was the translation of the term "accident" in Article 17, the Court clearly indicated that the term "damage" in Article 17 was the equivalent of injury). This interpretation is confirmed by the language in Article 18 which clearly states that the damage referred to is damage to baggage.[12] Moreover, if Article 17 was referring to monetary damages, at the very least dommage would be in its plural rather singular

---

11 This Court referred to *Harrat's New Standard French and English Dictionary*, by J.E. Mansion, *Collins-Robert French-English English-French Dictionary*, by Beryl T. Atkins, and *A French-English English-French Vocabulary of Legal Terms And Phrases*, by Jules Jereaute.

12 Article 18 provides that "the carrier shall be liable for damage sustained in the event of the destruction or loss of or of damage to, any checked baggage or any goods if the occurrence which caused the damage so sustained took place during the transportation by air."

form and it is more likely that the phrase "in actions for damages" would have been used as was done in Article 24. Thus, when Article 25 is read together with Article 17 which provides plaintiffs' cause of action, it is clear that Article 25 does not authorize punitive damage claims even if wilful misconduct exists.

CONCLUSION

While need to encourage the airline industry's growth may now be obsolete,[13] it is only the political branches which have the power to repudiate or amend the Warsaw Convention. *See Floyd*; *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 241, 261 (1984). In its most recent ruling on the Warsaw Convention, the Supreme Court once again admonished the courts that to "alter, amend, or add to any treaty would be . . . an unsurpation of power, and not an exercise of judicial functions".[14] *Chan v. Korean Airlines, Ltd.*, 109 S.Ct. 1676 (1989) (*quoting The Amiable Isabella*, 6 Wheat 1, 71, 5 L.Ed. 191 (1821)) (the issue before the court in Chan was whether carriers lost the benefit of the limitation

---

13 It may also be that the continued existence of the law of limited liability may not be wholly without any rational basis. A number of international airlines may be wholly owned by sovereign governments which might well not consent to being sued for punitive damages and if private carriers were subject to such damage suits they might be placed at a substantial competitive disadvantage. The treaty does provide for a carrier's liability to the extent of $75,000 for damage sustained as a result of an accident, *see Air France*, supra, and unlimited liability for damage sustained as a result of wilful misconduct. Also the treaty does not preclude passengers from purchasing at their own expense additional coverage which is readily available in almost all airports.

14 While no monetary figure may ever alleviate the loss suffered by the families of the 259 innocent victims on board Flight 103, it seems quite obvious to this Court that in today's world the figure provided by the Warsaw Convention adds insult to injury. However, this Court's duty is to interpret the treaty in a manner consistent with the parties expectations and to apply it where it governs. It is simply not within this Court's power to construe the treaty in a manner inconsistent with the contracting parties expectations.

on damages if they failed to provide notice of the limitation in 10-point type size). Therefore, in interpreting the Warsaw Convention in the only manner consistent with the shared expectations of the contracting parties at the time, this Court is compelled to hold that the Warsaw Convention bars plaintiffs' punitive damage claims whether or not wilful misconduct exists.

SO ORDERED.

THOMAS C. PLATT
Chief Judge, U.S.D.C.

Dated: Uniondale, New York
January 3, 1990

C1

Memorandum Opinion and Order

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MDL-724 (JES)
ENTERED January 18, 1990

IN RE HIJACKING OF PAN AMERICAN WORLD AIRWAYS, INC. AIRCRAFT AT KARACHI INTERNATIONAL AIRPORT, PAKISTAN ON SEPTEMBER 5, 1986

SPRIZZO, D.J.:

Defendant, Pan American World Airways, Inc. ("Pan Am"), has moved pursuant to Federal Rule of Civil Procedure 56 for partial summary judgment dismissing all claims seeking the imposition of punitive damages.[1]. Pan Am claims that because Article 17 of the Warsaw Convention as supplemented by the Montreal Agreement[2] (collectively referred to as the "Convention") creates a cause of action for compensatory damages limited to $75,000,[3] any recovery of punitive

1 These actions arise out of the hijacking of Pan Am flight 73 from Bombay, India to New York's Kennedy Airport. At a scheduled stop in Karachi, Pakistan, four armed terrorists seized the aircraft. Twenty passengers were killed and a number of other passengers were injured during the course of the hijacking. Because of the international nature of Flight 73, all parties agree that the Convention applies to these actions.

2 The Warsaw Convention is officially entitled the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934). The American translation of the Convention ratified by the Senate is reprinted in a note following 49 U.S.C. § 1502. The official version of the Convention, however, is in French. *See Air France v. Saks*, 470 U.S. 392, 397 (1985).

3 Article 22 as modified by the Montreal Agreement limits the amount of recovery for each passenger to $75,000.

damages is preempted by the Convention.[4] For the reasons set forth herein, the motion is denied.

DISCUSSION

Notwithstanding some early precedent to the contrary,[5] it is now well-settled in this Circuit that the Convention creates a right of recovery for wrongful death and personal injury independent of the various actions created by the internal law of the signatory nations. *See Benjamins v. British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979). However, that remedy, whether it be contractual or tortious in nature, does not supersede other state common law remedies not preempted by the Convention. *See*

---

4 Article 17 provides that:

> [t]he carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Pan Am contends that the phrases "damages sustained" and "bodily injury" preclude an award of punitive damage citing, *inter alia*, *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1483-89 (11th Cir. 1989).

Competing arguments have been made to the Court in the parties briefs and at Oral Argument held on November 2, 1989 over the correct translation of the phrases "damages sustained" and "bodily injury" from French to English. *See, e.g.*, *Plaintiff's Memorandum of Law* at 12-13. However, no expert testimony has been offered, and it would be improper, in the absence of such testimony, to speculate as to the correctness of the American translation. *Cf. Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d 385, 392-93, 314 N.E.2d 848, 853, 358 N.Y.S.2d 97, 103 (1974) (under New York law receipt of testimony may be appropriate "to enable a court to arrive at an accurate translation"). In any event, the Court does not find that this language, even accepting the correctness of the translation, specifically precludes an award of punitive damages.

5 *See Noel v. Lines Aeropostal Venezolana*, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957).

Tokio Marine & Fire Ins. Co. v. McDonnell Douglas Corp., 617 F.2d 936, 942 (2d Cir. 1980).[6]

Punitive damages are a part of common law tort remedies, *see Racich v. Celotex Corp.*, 887 F.2d 393, 396 (2d Cir. 1989), and no language in the Convention expressly preempts or precludes such claims, although consistent with Article 22, all damages, including punitive damages, cannot exceed $75,000. Nor may such preemption be implied in the absence of some clear indication in the text itself or its legislative history that supports that conclusion. *See Chan v. Korean Airlines, Ltd.*, 109 S. Ct. 1676, 1683-84 (1989).

Here, not only is there no such clear indication, but the language of the Convention leads to the opposite conclusion. Article 24(1) provides that "any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention." This language strongly suggests that the Convention contemplates state causes of action, including those for punitive damages, not founded in or created by the Convention. *See Tokio Marine*, *supra*, 617 F.2d at 942; *Reed v. Wiser*, 555 F.2d 1079, 1084-85 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977). Indeed, Article 24(2) expressly states that the Convention applies "without prejudice to the questions as to who are the persons who have the right to bring suit and *what are their respective rights.*" (emphasis added).

This is especially true since the Convention leaves many issues to be governed by the internal law of the parties to the Convention. One such issue is the question of what items of damages are recoverable. *See Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1002 (9th Cir. 1987); *Cohen v. Varig Airlines*, 62 A.D.2d 324, 334, 405 N.Y.S.2d 44, 49 (1st Dep't

---

6 While there is some language in *Benjamins* which suggests that the remedy created by the Convention is exclusive, *see* 572 F.2d at 917-19, that language is *dicta*. The issue addressed in *Benjamins* was whether a district court had subject matter jurisdiction over Convention cases and not whether that remedy is exclusive. *Id.* at 916.

In *Tokio Marine*, *supra*, the Second Circuit squarely held that the remedy provided by the Convention is not exclusive. *See id.* at 941-42. This Court is therefore constrained to follow that holding.

1978). Furthermore, both the rules governing comparative negligence, *see* Article 21, and "[q]uestions of procedure" are controlled by local law. *See* Article 28(2).

Also lending support to this position is *Racich v. Celotex Corporation*, *supra*, 887 F.2d at 396, where the Second Circuit rejected an argument that a claim for punitive damages was not available unless specifically referred to in a state statute reviving asbestos related tort claims which would otherwise have been time-barred. The court stated that "[s]ince a common law tort action for personal injury by definition includes the element of damages, including punitive damages when factually appropriate, the omission in the revival statute and the legislative silence with respect to punitive damages do not preclude such a recovery." *Id.* (citations omitted).

Even assuming that Article 17 did preclude the recovery of punitive damages, the Court finds that in any event the Convention would bar Pan Am's reliance on Article 17 in cases of wilful misconduct. Article 25(1) provides that:

> [t]he carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit the liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the Court to which the case is submitted, is considered to be equivalent to wilful misconduct.

Therefore, to the extent that Article 17 is construed to preempt a claim for punitive damages, it would be a limitation or exclusion of liability within the meaning of Article 25, and such claims would not be barred in cases involving wilful misconduct.[7]

---

7 The standards for wilful misconduct under the Convention and the conduct necessary for the recovery of punitive damages under common law are virtually identical. Wilful misconduct under the Convention requires either "the intentional performance of an act with knowledge that the performance of that act will probably result in injury" or "the intentional performance of an act in such a manner as to imply reckless disregard of the probable consequences." *See Republic Nat'l Bank v.*

Pan Am, however, argues that the only provision excluding or limiting liability within the meaning of Article 25 is Article 22's monetary limit, and, therefore, the relevant portions of Article 17 remain intact. However, Pan Am's interpretation, if accepted, would require the Court to construe Article 25 as if it read "the provision, to wit Article 22, . . . which limits *the amount* of his liability" which would constitute a judicial alteration of the plain language of the Convention foreclosed by *Chan*, *supra*. For this reason the Court cannot accept as persuasive the reasoning set forth by the Eleventh Circuit in *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1483-89 (11th Cir. 1989), which was followed in *In re Air Disaster in Lockerbie, Scotland*, M.D.L. 799 (E.D.N.Y. January 3, 1990). Both of these cases rely heavily upon a judicially perceived need to construe the Convention in accordance with the intention of the Contracting Parties. However, this Court does not believe that *Chan* permits the Court to amend the plain language of the Convention to effectuate what it believes the Contracting Parties intended.

In this regard, it is significant to note that an amendment to Article 25 which has never been ratified by the Senate provides that: "[t]he limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier . . . done with intent to cause damage or recklessly and with knowledge that damage would probably result." Hague Protocol Art. XIII, *reprinted*

Eastern Airlines, Inc., 815 F.2d 232, 238-39 (2d Cir. 1987) (quoting *Pekelis v. Transcontinental & Western Air, Inc.*, 187 F.2d 122, 124 (2d Cir.), *cert. denied*, 341 U.S. 951 (1951).

The standard to be met for a common law claim for punitive damages is also wilfulness or a reckless disregard of plaintiff's rights. *See, e.g.*, *Welch v. Mr. Christmas Inc.*, 57 N.Y.2d 143, 150, 440 N.E.2d 1317, 1321, 454 N.Y.S.2d 971, 975 (1988) ("recovery of punitive damages in a common law action requires a showing of a conscious disregard of the rights of others or conduct so reckless as to amount to such disregard"); *Hughes v. Blue Cross*, 215 Cal. App. 3d 832, 263 Cal. Rptr. 850, 858 (Cal. Ct. App. 1989) (punitive damages may be predicated on "intent to harm or a conscious disregard of another's rights").

in Lowenfeld, *Aviation Law Documents Supp.* at 429. The fact that the Contracting Parties saw the need to amend Article 25 to achieve precisely the same result that Pan Am would have this Court achieve by judicial interpretation affords additional support for the conclusion that the policy considerations underlying *Chan* preclude a judicial amendment of Article 25. This is especially true since the United States has refused to adopt that admendment. *Cf. Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 260-61 (1983) (courts should not imply repeal of Convention provisions).

Accordingly, Pan Am's motion for partial summary judgment is denied.

It is SO ORDERED.

Dated: New York, New York
January 18, 1990

JOHN E. SPRIZZO

John E. Sprizzo
United States District Judge

APPEARANCES

PLAINTIFF'S STEERING COMMITTEE

KREINDLER & KREINDLER
100 Park Avenue
New York, New York 10017

MAGANA, CATHCART, MCCARTHY & PIERRY
1801 Avenue of the Stars
Suite 810
Los Angeles, California 90067

MORGAN, WENZEL & MCNICHOLAS
1545 Wilshire Boulevard
Los Angeles, California 90017

MARC S. MOLLER, ESQ.
STEVEN R. POUNIAN, ESQ.
Of Counsel

WINDELS, MARX, DAVIES & IVES
Attorneys for Defendants
156 West 56th Street
New York, New York 10019

JAMES M. SHAUGHNESSY, ESQ.
Of Counsel

D1

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ENTERED May 14, 1991

At a stated term of the United States Court of Appeals for the Second Circut, held at the United States Courthouse, in the City of New York, on the fourteenth day of May, one thousand nine hundred and ninety-one.

IN RE: AIR DISASTER AT LOCKERBIE, SCOTLAND
ON DECEMBER 21, 1988

Docket No. 90-7388

DENICE H. REIN, et al.,

Plaintiffs-Appellants,

—v.—

PAN AMERICAN WORLD AIRWAYS INCORPORATED,

Defendant-Appellee.

No. 460—August Term 1990

(Argued October 1, 1990 Decided March 22, 1991)

Docket No. 90-7636

IN RE: HIJACKING OF PAN AMERICAN WORLD AIRWAYS, INC. AIRCRAFT AT KARACHI INTERNATIONAL AIRPORT, PAKISTAN ON SEPTEMBER 5, 1986

DILIP JOSHI, NADYA HUSSAIN, TAHRA LODHI, DILIP PARIKH, FARAIDOON OSHTORY, et al.,

Plaintiffs-Appellees,

—v.—

PAN AMERICAN WORLD AIRWAYS INCORPORATED,

Defendant-Appellant.

A petition for rehearing containing a suggestion that an action be reheard in banc having been filed herein by appellees Dilip Joshi et al.; and appellants, Denice H. Rein, et al., In re Air Disaster at Lockerbie, Scotland and In re Hijacking of Pan American World Airways Aircraft at Karachi Intl Airport, Pakistan.

UPON CONSIDERATION by the panel that heard the appeals, it is Ordered that said petition for rehearing is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

90-7388
90-7636

Filed March 22, 1991

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 22nd day of March, one thousand nine hundred and ninety-one.

Present: HON. RICHARD J. CARDAMONE
HON. ROGER J. MINER
Circuit Judges,
HON. MILTON POLLACK
*District Judge,**

IN RE: AIR DISASTER AT LOCKERBIE, SCOTLAND
ON DECEMBER 21, 1988

DENICE H. REIN, et al.,

Plaintiffs-Appellants,

—v.—

PAN AMERICAN WORLD AIRWAYS INCORPORATED,

Defendant-Appellee.

* Hon. Milton Pollack, United States District Judge for the Southern District of New York, sitting by designation.

IN RE: HIJACKING OF PAN AMERICAN WORLD AIRWAYS, INC. AIRCRAFT AT KARACHI INTERNATIONAL AIRPORT, PAKISTAN ON SEPTEMBER 5, 1986

DILIP JOSHI, NADYA HUSSAIN, TAHRA LODHI, DILIP PARIKH, FARAIDOON OSHTORY, et al.,

Plaintiffs-Appellees,

—v.—

PAN AMERICAN WORLD AIRWAYS INCORPORATED,

Defendant-Appellant.

Appeals from the United States District Court for the Eastern and Southern Districts of New York.

These causes came on to be heard on the transcript of record from the United States District Court for the Eastern and Southern Districts of New York and it was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the Judgment of the Southern District Court be and it hereby is reversed and the punitive damages claims are dismissed in accordance with the opinion of the court. The Judgment of the Eastern District in Rein v. Pan American World Airways, Inc., dismissing plaintifs punitive damage claims, is affirmed in accordance with the opinion of his court.

Elaine B. Goldsmith, Clerk

By: EDWARD J. GUARDARO,
Edward J. Guardaro,
Deputy Clerk

No. 91-259

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DENICE H. REIN, *et al.*,
Petitioners,
v.
PAN AMERICAN WORLD AIRWAYS, INC.,
Respondent.

DILIP JOSHI, *et al.*,
Petitioners,
v.
PAN AMERICAN WORLD AIRWAYS, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

JAMES M. SHAUGHNESSY
ARTHUR E. HOFFMANN, JR.
WINDELS, MARX, DAVIES & IVES
156 West 56th Street
New York, N.Y. 10019
(212) 237-1000

RICHARD M. SHARP *
FREDERICK C. SCHAFRICK
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

Attorneys for Pan American World Airways, Inc.

* *Counsel of Record*

September 11, 1991

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Are punitive damages available in cases governed by the Warsaw Convention?

2. Does the cause of action created by the Warsaw Convention provide the exclusive remedy for the wrongful death or personal injury of passengers in cases governed by the Convention?

RULE 29.1 STATEMENT

Respondent Pan American World Airways, Inc., is a wholly-owned subsidiary of Pan Am Corporation and has the following subsidiaries and affiliates that are not wholly-owned by it or Pan Am Corporation: Aeronautical Radio, Inc.; Air Cargo, Inc.; Airline Tariff Publishing Co.; Escola Americana de Rio de Janeiro; Honolulu Fueling Facilities Corporation; International Aeradio (Caribbean) Ltd.; Liberian Development Corporation; Manhattan Air Terminal, Inc.; Nigerian Aviation Handling Co.; Pan Am Commercial Services, Inc.; Promotora de Hoteles de Turismo Medellin, S.A.; Social Immobiliaria Norteamericana, S.A.; and Societe International de Telecommunications Aeronatiques.

Pan Am Corporation and its subsidiaries are presently undergoing reorganization under the Bankruptcy Code. Under the terms of an agreement that has been approved by the bankruptcy court, but that is not yet implemented and is subject to certain contingencies, Delta Air Lines, Inc. will ultimately own 45% of the stock in a new corporation which will trade under the name of Pan American World Airways.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-259

DENICE H. REIN, *et al.*,
Petitioners,

v.

PAN AMERICAN WORLD AIRWAYS, INC.,
Respondent.

DILIP JOSHI, *et al.*,
Petitioners,

v.

PAN AMERICAN WORLD AIRWAYS, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent Pan American World Airways, Inc. ("Pan Am") respectfully prays that the petition for certiorari filed in these cases on behalf of plaintiffs be denied.[1]

STATEMENT OF THE CASE

These cases involve claims for wrongful death and personal injury against Pan Am that arise out of two international aviation accidents: the midair explosion of Pan Am Flight 103 over Lockerbie, Scotland, on December 21, 1988, and the hijacking of Pan Am Flight 73 at the

---

[1] Citation to the petition for certiorari will be to "Pet."; citation to the appendices to the petition will be to "Pet. App."

Karachi International Airport, Pakistan, on September 5, 1986. Because both accidents occurred in international aviation, they are governed by the Warsaw Convention.[2] As supplemented by the Montreal Agreement [3] for flights serving the United States, the Convention limits carrier liability for wrongful death or personal injury to $75,000 per passenger, except in cases where plaintiffs can establish that death or injury was caused by the "wilful misconduct" of the carrier or its agents.

On interlocutory appeals taken pursuant to 28 U.S.C. § 1292(b), the U.S. Court of Appeals for the Second Circuit held that punitive damages may not be recovered in a Warsaw case. *In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988 ("Lockerbie")*, 928 F.2d 1267 (2d Cir. 1991), Pet. App. at A1. That court also held that the Warsaw Convention is the exclusive cause of action for redress of a passenger's wrongful death or personal injury in international aviation accidents. After the Second Circuit issued its opinion, the District of Columbia Circuit also held that punitive damages may not be recovered under the Convention, but that Circuit explicitly found that it was unnecessary to decide whether the Warsaw Convention creates an exclusive cause of action. *In re Korean Air Lines Disaster of Sept. 1, 1983 ("KAL")*, 932 F.2d 1475, 1485-90 (D.C. Cir. 1991). A petition for certiorari has been filed by the plaintiffs in the *KAL* case (No. 91-251).

---

[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, *done* at Warsaw, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted at* 49 U.S.C. app. § 1502 note.

[3] Agreement Relating to Liability Limitations of the Warsaw Convention and The Hague Protocol, Agreement CAB 18900, *approved*, CAB Order E-23680, 31 Fed. Reg. 7302 (1966), *reprinted at* 49 U.S.C. app. § 1502 note.

REASONS FOR DENYING THE WRIT

Introduction and Summary

Plaintiffs' petition lists three questions for review, but those questions boil down to two issues: (1) are punitive damages available in cases governed by the Warsaw Convention and (2) does the Warsaw Convention provide the exclusive cause of action for the wrongful death or personal injury of passengers in cases governed by it? On the first issue, as we show in Part I, three circuits have ruled that punitive damages may not be recovered under the Convention; and neither this Court nor any other circuit has reached a conflicting conclusion or result. The uniform rulings of the courts of appeals, moreover, are fully supported by the text, negotiating history, and purposes of the Warsaw Convention, as well as by the shared expectations of the parties to it. It also appears that no foreign court has rendered a reported decision indicating that punitive damages or any similar form of non-compensatory damages are recoverable under the Convention. Thus, the primary issue presented by petitioners does not merit review.

The secondary issue presented by petitioners—whether the cause of action created by the Convention is exclusive—does not control the question of whether punitive damages may be recovered. As we show in Part II, the Eleventh Circuit and the D.C. Circuit have held that punitive damages may not be recovered under the Convention while explicitly refraining from deciding the exclusivity issue. Furthermore, the ostensible conflict among the circuits over exclusivity is merely a conflict between a holding in the Second Circuit and earlier *dicta* from the Ninth Circuit. The Second Circuit's studied ruling is consistent with the Convention's text and history and with the practice of other contracting parties. Thus, review of the exclusivity issue is not warranted because that issue does not involve a genuine conflict in decisions of appellate

courts and resolution of the issue in a manner favorable to petitioners would not require reversal of the Second Circuit's ruling that punitive damages are not recoverable under the Convention.

I. THE DISMISSAL BY THE SECOND CIRCUIT OF PETITIONERS' CLAIMS FOR PUNITIVE DAMAGES IS SUPPORTED BY DECISIONS OF THE ELEVENTH AND DISTRICT OF COLUMBIA CIRCUITS; BY THE TEXT, NEGOTIATING HISTORY, AND PURPOSES OF THE WARSAW CONVENTION; AND BY THE SHARED EXPECTATIONS OF THE CONTRACTING PARTIES.

A. There Is No Conflict Between the Second Circuit's Decision and the Decisions of Other Circuits or of This Court.

There is no conflict among the decisions of the circuits or the highest State courts on whether punitive damages may be recovered in cases governed by the Warsaw Convention. Indeed, the only other appellate courts to have considered this question have concluded, as did the Second Circuit, that punitive damages may not be recovered in a case governed by the Warsaw Convention. *Floyd* v. *Eastern Airlines, Inc. ("Floyd I")*, 872 F.2d 1462, 1483-89 (11th Cir. 1989), *rev'd on other grounds*, 111 S. Ct. 1489 (1991); *KAL*, 932 F.2d at 1485-90. Furthermore, no foreign tribunal appears to have published an opinion that suggests in any way that punitive damages or some similar form of non-compensatory damages is available under the Convention.

Petitioners, however, contend that the decision below "is in conflict with the *analysis* and *review* of punitive damages by this Court in *Haslip* as well as this Court's refusal to read a punitive damages bar into two constitutional amendments and two statutes." (Pet. at 9 (emphasis added)), citing *Pacific Mutual Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032 (1991); *Browning-Ferris Indus. of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257

(1989); *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984); *Smith* v. *Wade*, 461 U.S. 30 (1983). None of these decisions purports to construe the Warsaw Convention, and none of them remotely suggests that there is a provision in the Constitution that would invalidate a statute or policy, much less a treaty, that limits relief to compensatory damages. *See, e.g., Electrical Workers* v. *Foust*, 442 U.S. 42 (1979) (punitive damages not recoverable for breach of duty of fair representation); *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 258-66 (1981) (municipalities immune from punitive damages otherwise allowable under 42 U.S.C. § 1983).

In short, there is no conflict among the appellate courts of this country or among the courts of other signatory nations that would justify the invocation of this Court's discretionary jurisdiction.

B. The Court Below Correctly Dismissed Petitioners' Punitive Damages Claims.

The decisions of the Second, Eleventh, and District of Columbia Circuits on this question are not only uniform, but also correct. Those decisions show that the unusual purposes and effects of punitive damages in American law are inconsistent with the Convention's text and negotiating history and with the shared expectations and purposes of the contracting parties. Fundamentally, the inconsistency arises because the Convention was intended to provide reparation or compensation for breach of the contract of carriage, whereas "[p]unitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct." *Newport* v. *Fact Concerts, Inc.*, *supra*, 453 U.S. at 266-67. As a result, "punitive damages . . . are in effect a windfall to a fully compensated plaintiff." *Id.* at 267.[4]

[4] The law of New York, which plaintiffs contend should govern this question, likewise recognizes that punitive damages "are not

1. *Article 17.* As it appears in the official translation, Article 17 states:

> "The carrier shall be liable for *damage sustained* in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the *accident which caused the damage so sustained* took place on board the aircraft or in the course of any of the operations of embarking or disembarking." 49 Stat. 3018 (emphasis added).

That is, the carrier is liable for "damage sustained" when the "accident" "caused the damage so sustained." The liability thus created is relief for "damage sustained," a term that does not encompass punitive damages because they are windfall recoveries and not "damage sustained" by the victim in an accident. *See Lockerbie*, 928 F.2d at 1280-81, Pet. App. at A31-A34; *accord, KAL*, 932 F.2d at 1485-86; *Floyd I*, 872 F.2d at 1486.

2. *Article 24.* Petitioners contend that Article 24 of the Convention preserves their right to seek punitive damages under state law.[5] Pet. at 26-27. As the court below

---

intended to compensate the injured party but to punish the tortfeasor for his conduct and to deter him and others like him from similar action in the future . . . ." *Sharapata* v. *Town of Islip*, 56 N.Y.2d 332, 335, 452 N.Y.S.2d 347, 348, 437 N.E.2d 1104, 1105 (1982). Hence, those "damages are a windfall for the plaintiff who, by hypothesis, has been made whole by the award of compensatory damages." *Home Ins. Co.* v. *American Home Products Corp.*, 75 N.Y.2d 196, 200, 551 N.Y.S.2d 481, 483, 550 N.E.2d 930, 932 (1990) (internal quotes omitted).

[5] Article 24 provides:

> "(1) In the cases covered by articles 18 and 19 [for damage to baggage or goods or for delay] any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
>
> "(2) In the cases covered by article 17 [for death or injury of a passenger] the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the

recognized, however, Article 24 simply looks to local law (that is, non-international law) to determine who can sue for the death or injury of a passenger and what are the appropriate measures for compensatory relief. There is no indication in the Convention's negotiating history that Article 24 was intended to preserve a common-law right to punitive damages. *Lockerbie*, 928 F.2d at 1282-85, Pet. App. at A36-A43; *accord*, *KAL*, 932 F.2d at 1487-88. On the contrary, the Convention's reporter explained that the drafters intended that Article 24 would leave to local law only the question of "what are the damages subject to reparation."[6] As noted above, punitive damages represent a windfall recovery, and are thus not "reparation."[7]

3. *Article 25.* Article 25(1) of the Convention provides in part: "The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct . . . ." 49 Stat. 3020. Petitioners contend that, if Article 17 renders the carrier liable only for compensatory damages, it is a provision which "excludes or limits" liability for purposes of Article 25. They further assert that the "plain language [of Article 25] dictates that *any* exclusion or limitation of liability is lost to the carrier if the damage was caused by its wilful misconduct." Pet. at 23 (emphasis in original).

The courts of appeals have soundly rejected this argument and have instead held that Article 25's reference to provisions "which exclude or limit" liability was intended to refer to a small number of the Convention's provisions

---

persons who have the right to bring suit and what are their respective rights." 49 Stat. 3020.

[6] *Second International Conference on Private Aeronautical Law, Warsaw, 1929, Minutes*, at 255 (R. Horner & D. Legrez trans. 1975) ("Warsaw Minutes").

[7] *See Smith* v. *Wade*, *supra*, 461 U.S. at 85 (Rehnquist, J., dissenting): "[A]s the Court concedes, punitive damages are not 'reparation' or 'compensation' . . . ."

—in particular, Article 22 (which limits monetary recovery against a carrier) and Article 20 (which furnishes the carrier with certain defenses). *Lockerbie*, 928 F.2d at 1285-87, Pet. App. at A42-A47; *KAL*, 932 F.2d at 1488-89; *Floyd I*, 872 F.2d at 1483. Petitioners' argument that a finding of "wilful misconduct" renders inapplicable "any" provision that in some fashion limits or excludes carrier liability is, moreover, contrary to other decisions. Those decisions have held that Article 29, which requires that an action for damages be commenced within two years, and Article 26, which extinguishes a carrier's liability for damaged baggage or goods if a complaint is not made within seven days, continue to apply even though plaintiff alleges wilful misconduct.[8]

Finally, petitioners' plain language argument must also fail because, within the context of the Warsaw Convention, Article 17 is not a provision that excludes or limits liability. One drafting the Convention would have viewed Article 17 as a provision that *creates* liability. The fact that the liability created only encompasses liability for compensatory damages does not make Article 17 a limitation with the meaning of Article 25.[9] Thus, as the

---

[8] With respect to Article 29, *see, e.g., Stone* v. *Mexicana Airlines, Inc.*, 610 F.2d 699 (10th Cir. 1979); *Molitch* v. *Irish International Airlines*, 436 F.2d 42 (2d Cir. 1970); *Magnus Electronics, Inc.* v. *Royal Bank of Canada*, 611 F. Supp. 436 (N.D. Ill. 1985). As to Article 26, *see, e.g., Highlands Ins. Co.* v. *Trinidad & Tobago (BWIA International) Airways Corp.*, 739 F.2d 536 (11th Cir. 1984); *Denby* v. *Seaboard World Airlines, Inc.*, 575 F. Supp. 1134, 1144-48 (E.D.N.Y. 1983), *remanded on other grounds*, 737 F.2d 172 (2d Cir. 1984); *Hewlitt Knitting Mills, inc.* v. *Flying Tiger Line, Inc.*, 669 S.W.2d 412 (Tex. Ct. App. 1984).

The dissent in the *KAL* case failed to deal with this authority showing that Article 25 does not refer to every provision in the Convention that could be claimed in some respect to exclude or limit carrier liability. *See* 932 F.2d at 1493-94 (Mikva, C.J., dissenting).

[9] The decision below is not in any way inconsistent with *Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122 (1989). The issue in *Chan*

court below held, "unlimited liability" under Article 25 "mean[s] only unlimited *compensatory liability*." 928 F.2d at 1287, Pet. App. at A47 (emphasis added).

4. *Shared Expectations.* To determine the shared expectations of the parties to the Warsaw Convention, one must first look to French law, "because the Warsaw Convention was drafted in French by continental jurists." *Air France* v. *Saks*, 470 U.S. 392, 399 (1985). As the courts of appeals have recognized, an action under the Warsaw Convention sounds in contract under the French civil law, and in civil law countries like France, punitive damages are not available in contract actions or, for that matter, even in tort actions. *See Lockerbie*, 928 F.2d at 1281-82, Pet. App. at A34-A35; *KAL*, 932 F.2d at 1487; *Floyd I*, 872 F.2d at 1486. Petitioners do not dispute this conclusion, but rather emphasize that a delegation from a common law country, Great Britain, also participated in the conference that drafted the Convention,[10] and claim that punitive damages were available under English law. Pet. at 25. But, as noted, the Convention's drafters intended to create an action sounding in contract, and the intention was shared by the British delegation.[11] Punitive damages are not available in

---

was governed by the clear and dispositive language of Article 3 of the Convention. Here, there is no clear and dispositive language showing that the restriction on punitive damages contained in Article 17 is lifted upon a finding of wilful misconduct under Article 25.

[10] The British delegation also represented Australia and the Union of South Africa. Warsaw Minutes at 7; 49 Stat. 3024. The United States only sent two observers to the Warsaw Conference, Warsaw Minutes at 10, and thus did not participate in the Convention's drafting.

[11] A British delegate, Orme Clarke, spoke against a proposal to allow the place of the accident to be one possible forum for bringing a liability action. Mr. Clarke said that "the place of the accident has nothing to do with the contract. . . . Ordinary contract law confers jurisdiction on the place where the contract was done, while the place where the accident occurs can have no relation to the

breach of contract actions in England,[12] and there is no showing that the English courts have ever awarded punitive damages in a Warsaw case.[13] Moreover, petitioners provide no reason why the civil law rule as to the non-availability of punitive damages should not govern this issue when the Convention was predominantly drafted by civil law jurists.

Petitioners criticize the court of appeals for "ascribing to Warsaw's drafters an intent to bar punitive damages because of their silence on the subject." Pet. at 25. But the Second Circuit found this silence telling because "there can be no doubt that had the question been raised it would have been hotly debated, especially since the concept is unique to the common law, and also because many of the airlines were state-owned." 928 F.2d at 1284, Pet. App. at A41.[14]

---

contract." Warsaw Minutes at 113-14. This statement shows that the British delegate must have considered the Convention to be creating an action in contract, inasmuch as the place where the accident occurs would be a natural place to bring an action in tort.

[12] *See, e.g.*, H. Street, *Principles of the Law of Damages* 29 (1962).

Moreover, it would not have been clear in 1929 whether purely punitive (*i.e.*, non-compensatory) damages would have been available in tort actions in England. *See* C. McCormick, *Handbook on the Law of Damages*, § 78, at 278 (1935). This uncertainty was only settled 35 years later in *Rookes* v. *Barnard*, [1964] A.C. 1129, [1964] 1 All E.R. 367, 410 (H.L.) (opinion of Lord Devlin).

[13] On the contrary, the House of Lords in *Fothergill* v. *Monarch Airlines, Ltd.*, [1981] A.C. 251, [1980] 2 All E.R. 696, 700 (H.L.), construed the French word "*dommage*" (damage) in Article 17 as meaning "monetary loss." Punitive damages are a windfall not encompassed within the concept of "monetary loss."

[14] The dissent in *KAL* suggested that the Convention might be analogized to workers' compensation statutes that "do not limit the availability of separate damage actions in cases of intentional misconduct by the employer." 932 F.2d at 1494. But there is no reason to think that the civil law jurists at the Warsaw Conference would have contemplated such an analogy to American law, and there is

5. *Purposes of the Convention.* Finally, the result reached below furthers the acknowledged purposes of the Warsaw Convention: "limiting the liability of air carriers in order to foster the growth of the fledgling commercial aviation industry" and "achieving uniformity of rules governing claims arising from international air transportation." *Eastern Airlines, Inc.* v. *Floyd ("Floyd II")*, 111 S. Ct. 1489, 1499, 1502 (1991). *See Lockerbie*, 928 F.2d at 1287-88, Pet. App. at A48-A51; *accord*, *KAL*, 932 F.2d at 1489-90; *Floyd I*, 872 F.2d at 1488. Petitioners do not challenge this aspect of the ruling of the Second Circuit, and it provides strong, additional support to the conclusion that the decision below was correct.

In sum, the courts of appeals to date have unanimously held that punitive damages are not recoverable under the Warsaw Convention, and their decisions are faithful to the Convention's terms and negotiating history and to purposes and shared expectations of the contracting parties who were guided by civil law concepts of contract and compensatory damages.

II. THE SECOND CIRCUIT'S DETERMINATION THAT THE WARSAW CONVENTION IS THE EXCLUSIVE CAUSE OF ACTION DOES NOT WARRANT REVIEW BY THIS COURT.

Petitioners also seek review of the determination of the Second Circuit that the cause of action created by the Warsaw Convention for personal injury and wrongful death in international aviation accidents is exclusive. As we show below, there is no direct or genuine conflict among the appellate courts on this issue; and the Second Circuit's resolution of the issue conforms to the negotiating history of the Convention and the practice of other parties to the Convention. Furthermore, the exclusivity issue does not have the intrinsic importance that might

---

no reason to believe that they ever contemplated awards of punitive damages against their air carriers, many of which were state-owned.

justify review; indeed, it is not even a necessary ingredient for affirming the Second Circuit's holding that punitive damages are not recoverable under the Convention, as the decisions of the Eleventh Circuit and the D.C. Circuit in *Floyd I* and *KAL* demonstrate.

A. There Is No Genuine Conflict Between the Decision of the Second Circuit in These Cases and the Decisions of This Court or Other Appellate Courts.

1. *Alleged Conflict with Other Appellate Decisions.* Petitioners contend that there is a split among the circuits on the question whether the cause of action created by the Convention is exclusive. Pet. at 12-13. The court below in this case and the Fifth Circuit have held that the Convention is exclusive. *See Boehringer-Mannheim Diagnostics, Inc.* v. *Pan American World Airways, Inc.*, 737 F.2d 456, 459 (5th Cir. 1984), *appeal dismissed and cert. denied*, 469 U.S. 1186 (1985). Likewise in accord with the decision of the Second Circuit are a decision of the Alabama Supreme Court [15] and *dicta* from a decision of the Third Circuit.[16] For the alleged conflict, petitioners rely on what, as we show below, is *dicta* in three cases from the Ninth Circuit and *dicta* from one plainly outmoded decision of the Virginia Supreme Court (Pet. at 12-13 & n.8).[17]

---

[15] *Newsome* v. *Trans International Airlines*, 492 So.2d 592, 599 (Ala.), *cert. denied*, 479 U.S. 950 (1986).

[16] *See Abramson* v. *Japan Airlines Co.*, 739 F.2d 130, 134 (3d Cir. 1984), *cert. denied*, 470 U.S. 1059 (1985).

[17] The dissent of Chief Judge Mikva in the *KAL* case (cited in Pet. at 12) obviously cannot be used to establish a conflict, nor can the statement of the Second Circuit in *Tokio Marine & Fire Ins. Co.* v. *McDonnell Douglas Corp.*, 617 F.2d 936, 942 (2d Cir. 1980). The court below said that the language in *Tokio Marine* quoted by plaintiffs (Pet. at 12) is "*dicta*," 928 F.2d at 1273, Pet. App. at A14, and it denied rehearing and rehearing *en banc* despite plaintiffs' contention that the decision in *Lockerbie* had improperly overruled *Tokio Marine*. Pet. App. at D1-D2. Finally, little weight should be given

In the first decision, *In re Aircrash in Bali, Indonesia, on April 22, 1974*, 684 F.2d 1301 (9th Cir. 1982), the Ninth Circuit held that any recovery for wrongful death under state law was subject to the limitations on damages contained in the Warsaw Convention. The court was not faced with the question of whether the Convention creates the exclusive cause of action. Indeed, it was not until the second decision, *In re Mexico City Aircrash of October 31, 1979*, 708 F.2d 400 (9th Cir. 1983), that the Ninth Circuit, for the first time, held that the Warsaw Convention creates a cause of action. The court was not faced with the question of whether that cause of action was exclusive, for it explicitly declined to decide whether plaintiffs had viable state-law causes of action at all. 708 F.2d at 418. Finally, in *Johnson* v. *American Airlines, Inc.*, 834 F.2d 721 (9th Cir. 1987), the Ninth Circuit dismissed a state-law action for damages as being in conflict with the Convention. There was thus no need to determine whether the Convention preempted even those state-law causes of action that are not in direct conflict with the Convention.

Sheris v. *Sheris Co.*, 212 Va. 825, 188 S.E.2d 367, *cert. denied*, 409 U.S. 878 (1972), presented the issue whether an award under Virginia's workers' compensation law for the death of an employee killed in an air crash should be reduced by the amount of damages recovered from the airline in a Warsaw case. The court concluded that the workers' compensation award should be so reduced, rejecting the contention that the Warsaw recovery should be viewed as a recovery on an insurance contract, rather than a recovery from a tortfeasor. 188 S.E.2d at 368, 372-73. The Virginia court presumably would have reached the same conclusion whether or not the cause of action created by the Convention is exclusive.

---

to inconsistent rulings of district courts that were not reviewed by the appropriate court of appeals. *E.g.*, *Rhymes* v. *Arrow Air*, 636 F. Supp. 737 (S.D. Fla. 1986).

In *dicta*, the Virginia court did state: "Numerous decisions establish that the Warsaw Convention does not create an independent right of action but only a presumption of liability leaving it for local law to grant the right of action." 188 S.E.2d at 370-71, *citing Noel* v. *Linear Aeropostal Venezolana*, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957). But the reasoning of the *Noel* decision was later repudiated by its author, Judge Lumbard, in an opinion for the Second Circuit, and the federal courts of appeals have since uniformly held that the Convention does create a cause of action.[18] There is no reason to believe that the Virginia court would still follow the outdated statement of law quoted by petitioners.

In short, in the absence of a genuine conflict, there is no reason for the Court to grant review on the question of whether the Warsaw Convention creates the exclusive cause of action. When other appellate courts are actually faced with the issue, they may well agree with the Second and Fifth Circuits that the Warsaw Convention does create the exclusive cause of action.

2. *Alleged Conflict with This Court's Preemption Decisions.* Petitioners also contend that Second Circuit's decision on exclusivity and preemption "runs counter"

[18] The understanding of Article 17 reflected in *Noel* was changed by Judge Lumbard's opinion for the court in *Benjamins* v. *British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979), which held that the Convention does create a cause of action cognizable in the U.S. district courts under federal-question jurisdiction. Since *Benjamins*, the Third, Fifth, Ninth and Eleventh Circuits have held that the Convention does create a federal cause of action. *See Abramson* v. *Japan Airlines Co.*, *supra*; *Boehringer-Mannheim Diagnostics, Inc.* v. *Pan American World Airways, Inc.*, *supra*; *In re Mexico City Aircrash of Oct. 31, 1979*, *supra*; *St. Paul Ins. Co. of Illinois* v. *Venezuelan International Airways, Inc.*, 807 F.2d 1543 (11th Cir. 1987). This Court has implicitly agreed with these decisions. *See Floyd II*, 111 S. Ct. at 1492 n.2 (Court did not address theories of recovery claimed under state law, but rather "only the theory of recovery claimed under the Warsaw Convention").

to recent decisions of the Court that decline to preempt state tort laws. Pet. at 17-19. Whether such remedies are preempted depends upon the particular federal interest involved and upon congressional intent, either express or implied. None of the cited cases involved a federal treaty or statute that on its face modifies traditional state tort law remedies,[19] as the Warsaw Convention manifestly does. Thus, the decision below does not even vaguely or indirectly conflict with this Court's decisions.

In fact, the decision below is in harmony with this Court's decisions holding that three federal statutes relating to wrongful death and personal injury are exclusive of state law. *See, e.g., New York Central R.R.* v. *Winfield*, 244 U.S. 147, 149 (1917) (Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, enacted in 1908, preempts state-law workers' compensation claims); *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 155 (1964) (Jones Act, 46 U.S.C. app. § 688, enacted in 1920, preempts state-law wrongful death claims); *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 233 (1986) (Death on the High Seas Act, 46 U.S.C. app. §§ 761-68, enacted in 1920, preempts state wrongful death laws for deaths occurring beyond the territorial waters).

In sum, the Second Circuit's holding that the Convention is exclusive was based on its conclusion that "[t]he

---

[19] Plaintiffs cite four cases (Pet. at 18). *English* v. *General Electric Co.*, 110 S. Ct. 2270 (1990), held that a statutory prohibition on retaliatory discharge did not impliedly preempt state tort law remedies for such discharge. *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984), held that extensive regulation of the nuclear industry did not preempt state law claims for punitive damages when Congress clearly intended that tort actions could be brought. In neither case, had Congress expressly modified state tort laws. The other two cited cases did not involve tort law at all. *California* v. *ARC America Corp.*, 490 U.S. 93 (1989), involved state antitrust laws, and *Huron Cement Co.* v. *Detroit*, 362 U.S. 440 (1960), dealt with a local smoke ordinance.

existence of separate state causes of action conflicts so strongly with uniform enforcement of the Treaty" as to overcome any presumption against preemption. 928 F.2d at 1278, Pet. App. at A26. That reasoning is entirely consistent with the decisions of this Court that are cited in the preceding paragraph.

B. The Second Circuit's Decision Conforms to the Convention's Language and Negotiating History and to the Practices of Other Signatories.

Petitioners assert (Pet. at 14) that exclusivity is contrary to the "plain language" of Article 24 of the Convention which states in part: "[A]ny action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention." 49 Stat. 3020. While petitioners' contend that this language permits only one interpretation, they ignore the Second Circuit's point that Article 24 is subject to two interpretations: "The first is that a local cause of action (actions 'however founded') may be brought, but that it is subject to the conditions and monetary limits of the Convention. The second interpretation is that a plaintiff, whatever his damages, cannot circumvent the Convention by bringing any action other than one under Article 17." 928 F.2d at 1282, Pet. App. at A36-A37.

The court below adopted the second interpretation of Article 24 when it held that the cause of action created by the Convention is exclusive. That construction is supported by the negotiating history, for a British delegate to Warsaw, Sir Alfred Dennis, said of Article 24: "It's a very important stipulation which touches the very substance of the Convention, because *this [provision] excludes recourse to common law* . . . ." Warsaw Minutes at 213 (emphasis added).

Finally, the practices of other contracting parties are to be given "considerable weight" in interpreting the Convention. *See Saks*, 470 U.S. at 404 (internal quotation

omitted). In recognition of the principle of exclusivity, the French courts have rejected efforts by plaintiffs to bring actions outside of the Convention.[20] So too, the 1932 British statute implementing the Convention made it the exclusive cause of action for a passenger's wrongful death,[21] as do the comparable statutes of Australia and Canada.[22] The court below rightly gave these practices substantial weight. *See* 928 F.2d at 1274, Pet. App at A16.

The fact that the Second Circuit's decision conforms to the Convention's language and negotiating history and is consistent with the practices of other signatories is an additional reason for denying certiorari in these cases.

C. The Second Circuit's Decision on Exclusivity Is Not of Sufficient Importance to Warrant Review by This Court in the Absence of a Genuine Conflict.

Petitioners contend that the Second Circuit's exclusivity ruling will have "wide-ranging consequences" because it means that all Warsaw Convention cases can be heard by the federal courts. Pet. at 11. This is not especially significant since plaintiffs in a Warsaw case previously were entitled to invoke the federal-question jurisdiction of the district courts by pleading the cause of action created by the Convention. Moreover, the airlines previously were entitled to remove to federal district court any interna-

---

[20] *See* G. Miller, *Liability in International Air Transport* 235-39 (1977).

[21] Carriage by Air Act, 1932, 22 & 23 Geo. 5, ch. 36, § 1(4). The language on exclusivity was deleted when the British Parliament revised the statute in light of The Hague Protocol of 1955, *see* Carriage by Air Act, 1961, 9 & 10 Eliz. 2, ch. 27, "but there is no indication that any change of substantive law was intended." *Benjamins* v. *British European Airways*, *supra*, 572 F.2d at 919.

[22] *See* Civil Aviation (Carrier's Liability) Act, 1959-1973, § 12(2), 2 Austl. Acts P. 643, 645 (1974); Carriage by Air Act, § 2(5), Can. Rev. Stat., ch. C-26 (1979).

tional air disaster case where the Warsaw Convention cause of action was pleaded or where there was diversity of citizenship. The only effect of the exclusivity ruling is to permit airlines to remove from state courts those international disaster cases that plead only state-law causes of action and that lack diversity-of-citizenship jurisdiction, typically because suit has been brought in a state where the airline or a codefendant is incorporated or has its principal place of business. *See* 28 U.S.C. § 1441(b).

The Second Circuit also concluded that federal common law should supply the law in those instances where the Convention expressly leaves an issue to local law (928 F.2d at 1278-80, Pet. App. at A26-A30). Petitioners assert, without any authority, that the "elements of recoverable compensatory damages and the recipients of these damages" are "greatly affected" by whether they are governed by state law or by federal common law. Pet. at 11. In fact, the applicability of federal common law to determine who are the proper plaintiffs and what are elements of damages has been a possibility since the federal courts first recognized a decade or so ago that the Convention creates a federal cause of action. *See In re Mexico City Aircrash*, *supra*, 708 F.2d at 415 & n.27. We are aware of no litigation regarding a conflict between the federal and state law on who can sue and what compensatory relief is available.[23] Moreover, those two questions are not likely to be important so long as the Warsaw limitation remains in effect, for the parties will settle any serious claims for $75,000 rather than litigate such issues.

Finally, the exclusivity ruling is not even critical to the outcome of this case. Petitioners contend that the ruling

---

[23] The only reported conflict of which we are aware involved a different issue. The Fifth Circuit in *Boehringer-Mannheim*, *supra*, held that Texas law regarding the recovery of attorneys' fees in lost freight cases should not be applied. 737 F.2d at 459. This Court denied certiorari. 469 U.S. 1186.

was a "necessary part" of the Second Circuit's decision to dismiss their claims for punitive damages, Pet. at 10, but the Eleventh Circuit in *Floyd I* (872 F.2d at 1482) and the District of Columbia Circuit in *KAL* (932 F.2d at 1486, 1488) have dismissed claims for punitive damages while explicitly declining to reach the exclusivity question.[24]

In short, there is no genuine conflict among the appellate courts as to whether the cause of action created by the Convention is exclusive, and the issue does not otherwise have such importance as to warrant review by this Court.

---

[24] Thus, the *KAL* case does not present the exclusivity issue. Petitioners in *KAL* contend that the D.C. Circuit must have implicitly held the Convention to be the exclusive cause of action, on the theory that the Convention could otherwise not preempt federal maritime law, which they claim is of "equal stature" to the treaty. Pet. in No. 91-251, at 10-11. But this Court has held federal common law, including maritime law, is interstitial in nature and must give way, when inconsistent, to the enactments of Congress. *See Milwaukee* v. *Illinois*, 451 U.S. 304, 312-17 (1981); *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625 (1978). Accordingly, the *KAL* court correctly held that any allowance of punitive damages in maritime common law must defer to the inconsistent scheme of the Warsaw Convention, a treaty approved by Congress, under which only compensatory damages can be awarded. In making that ruling, the *KAL* court was not required to decide whether the Warsaw Convention furnishes the exclusive cause of action.

CONCLUSION

For the foregoing reasons, the petition for certiorari in these cases (as well as the petition in No. 91-251, which raises the same issues) should be denied.

Respectfully submitted,

JAMES M. SHAUGHNESSY
ARTHUR E. HOFFMANN, JR.
WINDELS, MARX, DAVIES & IVES
156 West 56th Street
New York, N.Y. 10019
(212) 237-1000

RICHARD M. SHARP *
FREDERICK C. SCHAFRICK
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

Attorneys for Pan American World Airways, Inc.

* *Counsel of Record*

September 11, 1991